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OF CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE,
FOR THE
EASTERN DIVISION,
FOR THE YEAR
1870.

JOSEPH B. HEISKELL,
REPORTER.

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CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE,
FOR THE
EASTERN DIVISION.

KNOXVILLE,.....SEPTEMBER TERM, 1870.

JOHN H. HUNTER, Plaintiff in error, v. R. R. ANDER-
SON, Surviving Partner, etc.

1. ACCOUNTS. *From other County or State. Nature of.* An account "for balance due on price of a horse" is such an account as may be proved under the Code, § 3780, which makes accounts, coming from another county or State, properly verified, evidence.
2. SAME. *How declared on. Profert.* Unless the declaration on such an account avers that the account does come from another county or State, and makes profert thereof, verified as required, the defendant can not be required to deny* the account on oath; nor will the plaintiff be entitled to read the account on the trial as evidence.

Case construed, *Cave & Schaffer v. Baskett*, 3 Hum., 340.

Code construed; Code, 3780; Act of 1819, chapter 25.

FROM CAMPBELL.

Appeal in error from the Circuit Court of Camp-
bell County. L. C. HOUK, J., presiding.

*Denial. See *Brown v. Stabler*, post.

John H. Hunter *v.* R. R. Anderson, Surviving Partner, *etc.*

E. C. CAMP, WASHBURN & PROSSER, for plaintiffs.

GEORGE ANDREWS, for defendant in error.

FREEMAN, J., delivered the opinion of the Court.

This is an action, brought in the Circuit Court of Campbell County, by Anderson, surviving partner, *etc.*, against Hunter, to recover "one hundred dollars, which, he says, is due from defendant, on the 4th day of November, 1864, by account, for balance due on price of a horse." Defendant filed a plea, denying that he owed the debt sought to be recovered, and gave notice of special defenses. The case was tried on these issues, and plaintiff recovered a judgment, from which there was an appeal in error to this Court.

The first question before us is, that this is not an account that may be proven under the Act of 1819; transferred to Code, section 3780. We hold that this is such an account as may be proven by affidavit, and made evidence under said section of the Code. It is property sold, and the number of items in the account, we think, does not in any way change its character.

The second question presented is, the admissibility of the account of the plaintiff under the state of the pleadings in this case.

The section of the Code, 3780, provides that, "an account on which an action is brought," coming from another County or State, with the affidavit of the plaintiff to the correctness of the account, and certified as required, is conclusive evidence against the party sought

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to be charged, unless he shall, on oath, deny the account.

It is required that the action shall be brought on the account thus verified. This Court said in the case of *Cave and Schaffer v. Baskett*, 3 Hum., 340, that by chapter 27, section 4 of the Act of 1819, "it was provided that the party pleading *non est factum*, to (or more correctly denying the execution of) any promissory note or bill of exchange, *etc.*, should make affidavit to the truth of his plea, and that the Act under consideration is only intended to put a proven account on the same footing."

We hold the fair construction of the section of the Code to be, that the action must be brought on the proven account; that the defendant should have notice of the fact, that the foundation of the suit is such an account, in order that he may deny the correctness of the same on oath. We hold that the complainant should, in his declaration, allege that the account is an account from another County or State, verified under this section of the Code, and make profert of such account in his declaration, in order that defendant may be informed of the nature of the cause of action against him, and be able to make the defense allowed by the statute. Unless this shall be done, the defendant may in any case be surprised on the trial of the case.

We do not think the plaintiff was entitled to introduce his account in the case, because, from his declaration, it does not appear that his action was brought on a proven account under the statute, but a simple account

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which imports nothing more than an indebtedness of a party to another in the form of an account. It certainly does not import in any way that such account has been so verified, as to place it on the footing of a promissory note as evidence, and make it conclusive as to the liability of the defendant. The evidence introduced was of a different character from the cause of action alleged, and ought to have been rejected by the Court.

We hold further, that the defendant, who wishes to deny the correctness of the account described and referred to in the declaration of plaintiff, must file such denial, with his plea, to the plaintiff's declaration, unless he shall be permitted to file it at a subsequent period, by the Court; which the Court may allow, in the exercise of its discretion.

This opinion does not conflict with the case of *Brien v. Peterman and Cope*, 3 Head, 498. That case only holds that plaintiff was not entitled to a new trial on account of alleged surprise, by the denial under oath, of the defendant, having been filed, at the time it was filed, in that case. The Court held, very properly, that if he was not prepared to prove his demand, after this denial, he should have asked for a continuance. Having gone into the trial without objection, he could not claim a new trial on account of alleged surprises by a fact well known to him before the trial was commenced.

It is insisted, however, that the failure of plaintiff to file his account with his declaration, is only equivalent to a failure to make profert of a promissory note, when sued on, and could only be taken advantage of by

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special demurrer. In our view of the case, no demurrer could have been filed for such cause, as the fact that the suit was brought on an account proven under the statute, did not appear on the face of the declaration.

The judgment will be reversed, and the case remanded for trial.

GEORGE W. SMITH, Plaintiff in error, v. T. W. LARGE
and H. JOHNSON.

1. **EVIDENCE.** *Primary and secondary. Design of a writing.* The plaintiffs in a suit offered parol proof that they had executed to the defendant, as agent of the Confederate States, a bond binding them to let the Southern Confederacy have sixty per cent. of the leather they manufactured, without evidence to show that the bond was lost, or notice to produce it. The Court admitted the evidence to prove the "existence and design" of the bond, "not its contents." This was error. The design must be proved by its contents.
2. **SAME.** *Accounting for original papers of Confederate States.* The fact that a paper relates to the business of an extinct political organization, is not a ground on which secondary evidence is admitted, without accounting for the primary evidence.
3. **SAME.** *Conversation not to be admitted partially.* When part of a conversation is admitted in evidence, it is error to exclude another part, to which the part admitted is a reply, and without which the part admitted is hardly intelligible, though the part so excluded might of itself be irrelevant to the issue.
4. **DURESS.** *Presumption of continuing duress.* No presumption of continuing duress, under the circumstances of the case.
5. **AMENDMENT.** *While charging jury, error.* Code construed, § 2869. In a

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case coming by appeal from a Justice of the Peace, it is error to allow an amendment, changing the form of action from "debt on account" to "trespass," after the Court has commenced charging the jury.*

FROM CAMPBELL.

Appeal in error from the Circuit Court of Campbell County. L. C. HOUK, J., presiding.

L. A. GRATZ, for plaintiff in error.

BAXTER, CHAMPION and GIBSON, for defendants.

DEADERICK, J., delivered the opinion of the Court.

This was an action of "debt due by account," as originally instituted and prosecuted before a Justice of the Peace of Campbell County. Judgment was rendered against plaintiff in error, and he appealed to the Circuit Court.

In that Court a judgment was also rendered against the plaintiff in error; and the Court refusing to grant a new trial, an appeal, in the nature of a writ of error, was taken to this Court.

The purpose of the action seems to have been to recover the value of a certain quantity of leather, for the delivery of which the defendants in error, had executed their bond in 1863, to plaintiff in error—he being at that time an agent for the Confederate States.

Several errors are complained of by the plaintiff in error:

1. It is insisted by him that the Court erred in ad-

* See *Fowlkes v. Long*, 4 Hum., 511, 513. Acc.

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mitting parol proof of the contents of the bond executed for the delivery of the leather. The witness, Chapman, was allowed to state that "the bond was, that Large & Johnson should let the Southern Confederacy have sixty per cent. of the leather they manufactured." And this testimony, although objected to when offered, the bill of exceptions states, was admitted by the Court "not to prove contents of the bond, but its existence and design, for which it was executed and given."

It is difficult to conceive how you can ascertain the design, without proof of its contents, of which the bond itself is the highest and best evidence.

To lay the foundation for the introduction of secondary evidence, or parol proof, of the contents of a writing, there must be some proof that the instrument is lost; or, if it was known to have last been in the hands of the adverse party, notice to him or to his attorney, to produce it, must be given.

While there are some exceptions to this rule, we do not think that the fact that the bond was executed to the plaintiff in error, as an officer in an extinct organization, places it in the list of excepted cases.

The plaintiff in error offered to prove that the defendant in error, Large, had a conversation with one John Jones, in which Jones had stated to Large that, under a decision of our Supreme Court, one Frank Kincaid could make him, Large, pay again for a carriage he had bought of Kincaid, and paid for in Confederate money, during the war, to which Large replied: "If that is the way, I'll make Smith pay over again for that leather," *etc.* Upon objection being made by the

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plaintiffs below, this testimony, as to the carriage trade, was all excluded by the Court.

We think what Jones said to Large, should have been allowed to go to the jury, in order to enable them better to understand the reply of Large. And, in this case, it would be difficult to understand the purport of Large's reply, if the remarks of Jones, which elicited it, were excluded. We think therefore, that the Circuit Judge erred, in saying to the jury that they could not look, for any purpose, to anything said about the carriage trade.

The Court charged the jury, that, if they believed the plaintiffs, below, acted under duress or constraint in executing the bond, that duress would be presumed to have continued, in the absence of any proof to the contrary, and that the presumption would be, that the leather was delivered under the original and still continuing coercion.

While we are satisfied, that in this case, there is no proof in the record of any coercion, to execute the bond, amounting to legal duress, we do not think, that, if the duress had been shown in the execution of the bond, the law would raise any presumption of its continuance, in the absence of any proof that there was any further communication between the parties after the execution of the bond.

While the Court was charging the jury, as we infer from the record, the plaintiffs below were permitted to amend their warrant, changing the form of action from "debt on account" to "trespass," to which defendant excepted.

James Jennings v. Joseph E. Mercer.

The very liberal provisions contained in the Code for amendment of writs, pleadings and other proceedings in causes, are designed to promote the ends of justice, not to operate prejudicially to parties; and section 2869, amongst other amendments which it authorizes, provides that the Court shall have power "to change the form of action, *etc.*, "upon such terms as to continuances, as the Court in its sound discretion, may see proper to impose."

This language strongly implies that the change of the form of action will only be allowed before trial is commenced; and such, we think, is a reasonable and proper construction of our statute of amendments.

From the principles laid down in this opinion, it follows that the judgment in the Circuit Court in this case must be reversed.

JAMES JENNINGS, in error, v. JOSEPH E. MERCER.

1. APPEAL. *Pauper oath, Amendment.* Certificate, of appeal prayed and of taking pauper oath, does not prove appeal granted. Amendment necessary.

FROM GREENE.

Appeal in error from the Circuit Court of Greene County, R. R. BUTLER, J., presiding.

James Jennings v. Joseph E. Mercer.

R. M. BARTON, for plaintiff in error.

McKEE & McFARLAND, for defendant in error.

The certificate referred to in the opinion is as follows:

“In this case the defendant prays an appeal, and swears, that, owing to his poverty, he is not able to bear the expenses of the suit, to the next term of the Circuit Court for Greene County, and that he is entitled to a recovery in the case.

“This, October 30, 1866.

“Test: WILLIAM MCCOY, J. P. for G. C.”

NICHOLSON, C. J., delivered the opinion of the Court.

Defendant in error recovered a judgment for \$75 against plaintiff in error, before a Justice of the Peace of Greene County. He prayed an appeal to the Circuit Court, and the Justice of the Peace certifies that he took the pauper oath, but no such oath, subscribed by him, is found in the record, nor does it appear from the record, that the appeal was granted by the Justice of the Peace.

On motion, the Circuit Judge dismissed the appeal, no motion being made to amend, or file a proper oath.

There is no error, and the judgment is affirmed.

John G. King v. Wm. Booker.

JOHN G. KING in error, v. WM. BOOKER.

APPEAL. *Amendment.* Appeal bond is evidence of an appeal granted, and no amendment is necessary to show it. Code, § 4178.

FROM SULLIVAN.

From the Circuit Court of Sullivan County. E. E. GILLENWATERS, J., presiding.

JAMES G. DEADERICK, for plaintiff in error.

NICHOLSON, C. J., delivered the opinion of the Court.

Defendant in error obtained a judgment before a Justice of the Peace, in Sullivan County, against plaintiff in error. The latter executed a bond for an appeal, which recited that an appeal was prayed and granted; but it was not stated in the judgment that any appeal had been prayed for or granted. On a motion in the Circuit Court, the Justice was allowed to amend his judgment, so as to show that an appeal had been prayed for and granted, on or before the second day of the next term. The amendment not being made within the time, the Circuit Judge refused to allow the amendment at a subsequent day of the term, but, on motion of the defendant in error, dismissed the appeal. This was error. As the appeal bond showed that an appeal had been prayed and granted, this was presumptive evidence of the fact, and until the presumption was rebutted,

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there was no necessity for any amendment. Code, § 4178. But if the presumption had been rebutted, the Circuit Judge should have allowed the amendment. Code, § 2875; 7 Hum., 61.

The judgment will be reversed, and the cause remanded.

WM. BOON, in error, v. MARY RAHL, by her husband,
A. RAHL.

1. ATTACHMENT. *Plea in abatement not an appearance.* Pleading in abatement to an attachment is not an appearance, by which the Court acquires jurisdiction, of the person.
2. SAME. *Same. Conclusion.* A plea in abatement, traversing the causes of attachment set out in the affidavit, properly concludes to the country.

FROM KNOX.

From the Circuit Court of Knox County. E. T. HALL, J., presiding.

JOHN BAXTER, for plaintiff in error. Cited *Hearn v. Crutcher*, 4 Yerg., 461; Code, § 4321; *Kendrick v. Davis*, 3 Cold., 524; *Foster v. Hall*, 4 Hum., 346; *Isaacs v. Edwards*, 7 Hum., 465; *Harris v. Taylor*, 3 Sneed, 536; *Chambers v. Haley*, Peek, 159; *Friedlander v. Pollock*, Ms. King's Dig., § 61. J. R. COCKE with him.

M. L. HALL, for defendant.

TURNEY, J., delivered the opinion of the Court.

Wm. Boon v. Mary Rahl, by her husband, A. Rahl

The demurrer to the plea, in abatement of the plaintiff in error, was improperly sustained by the Circuit Court.

The defendant in error commenced suit by attachment, in the Circuit Court of Knox County. A counterpart was issued to Jefferson County. The affidavit for the attachment recites that, William Boon is justly indebted to Mary Rahl, wife of A. Rahl, about the sum of four thousand six hundred dollars, of which sum about sixteen hundred dollars is now due—the notes of equal amount, for the remaining three thousand dollars, maturing in about one, two and three years from the 4th day of November, 1865; that the said William Boon has fraudulently disposed of, or is about fraudulently to dispose of, his property, as affiant is informed and believes," *etc., etc.*

This suit was commenced on the 15th of November, 1865.

At the February Term, 1866, the plaintiff in error filed the following plea in abatement:

"STATE OF TENNESSEE, KNOX COUNTY.	}	William Boon v. M. Rahl and Adolph Rahl.
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"In the Circuit Court of Knox County, Tenn., February Term, 1866.

"And the defendant, William Boon, in his own proper person, comes and defends, &c., when, &c., and prays judgment of the original and counterpart writs of attachment in this cause, &c., because he says he had not fraudulently disposed of his property or any part thereof, nor was he about fraudulently to dispose of his

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property or any part thereof, at the time of the issuance of said writs or either of them, or at any other time before or since that time, as in and by the affidavit of said writ is most falsely and erroneously alleged; and this, he prays, may be enquired of by the country, whereupon he prays judgment, that the said original and counterpart attachment may be quashed.”

The defendant in error demurred to this plea, and assigned the following causes, with others not necessary to consider:

1st. That by his appearance, the Court acquired jurisdiction of the plaintiff in error; therefore, he cannot object to the process of attachment.

2d. The plea concludes to the country, when it should have concluded with a verification.

3d. Because the plea does not allege that the other causes mentioned in the Code, authorizing the issuance of attachments, besides the causes mentioned in the plea, did not exist.

As to the first cause, we answer: A plea in abatement can only be pleaded in proper person; and it would be a contradiction in terms to hold that the appearance of a defendant, to make such a plea, waived his right to make it.

As to the second: The conclusion to the country was right, under the strictest rules of pleading, notwithstanding the general rule, that pleas in abatement must conclude with a verification. This is because such pleas usually present new matter. The matter of the plea, here, is responsive to and negatives the allegation of

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the affidavit upon which the attachment issued, and which are the foundation of the right of action of the defendant in error. The defendant in error was entitled to traverse the right of action. He proposes no issue not tendered by the defendant in error, and simply proposes to controvert that offered—remaining on the defensive, requiring by his plea, the defendant in error to maintain by proof his affirmative charges.

As to the third cause; there is nothing calling upon the plaintiff to negative any grounds of attachment, except those recited in the plea. They are the grounds upon which the affidavit is based. If the plea had negatived the other causes mentioned in the Code, the plaintiff in error would have pleaded matter foreign and immaterial, as well as tendered a plea objectionable for duplicity.

Upon the Court sustaining the demurrer, the plaintiff in error declined to plead over. This was right. Judgment by default, for want of a plea, was had, and the case brought into this court by writ of error.

The judgment of the Circuit Court is reversed, the demurrer overruled, and the cause remanded for issue and trial, upon the plea in abatement.

Henry Riley *et als.* v. Jesse P. Nichols.

HENRY RILEY *et als.* v. JESSE P. NICHOLS.

1. ATTACHMENT. *Publication defective.* A publication, under § 3522 of the Code, not containing the requisites of that section, would give the Court no jurisdiction of a judicial attachment, and a judgment by default founded thereon would be void.
2. SAME. *Same. What are requisites of.* A notice is fatally defective which fails to show that the attachment had been issued, or that it had been levied, or the cause for which it had been issued.
3. SAME. *Same.* Levy of attachment must precede publication.
4. SAME. *Same. Time of.* A judgment by default on a publication requiring a defendant to appear within thirty-five days after levy of attachment does not leave time for a legal publication, and is void.

FROM HANCOCK.

Trespass from the Circuit Court of Hancock county.
JAMES P. SWANN, presiding.

JAMES T. SHIELDS, for plaintiffs in error.

No counsel appeared for defendant in error.

FREEMAN, J., delivered the opinion of the Court.

This was an action of trespass commenced by defendant in error against the plaintiffs in error and others, in the Circuit Court of Hancock county.

The summons was issued on the 27th of September, 1865, and on same day an ancillary attachment was issued and levied on the property of defendants. The

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summons was returned "not to be found," by the Sheriff, on the 15th day of January, 1866, as to all of the defendants. Thereupon a judicial attachment was ordered by the Court, on the 23d day of January, 1866, which was issued 23d day of February, 1866, and levied on property of defendants on 27th day of April, 1866.

On the 14th day of April, 1866, an order of publication was made by the Clerk, requiring the party to appear on the 4th Monday in May, 1866.

The declaration was filed on the 30th of May, 1866, and on the 20th day of September, 1866, judgment by default was taken against Henry Riley and the other defendants. At May Term, 1866, the writ of inquiry ordered was executed by a jury, who assessed complainant's damages at five thousand dollars, for which sum judgment was entered by the Court, to reverse which judgment, the defendants prosecute their writ of error in this Court.

We need not notice the ancillary attachment or the proceedings under the same, as that was abandoned by complainant and resort had to judicial attachment, under which the property levied on was ordered to be sold. Suffice it to say that, in the opinion of the majority of the Court, said ancillary attachment was essentially defective, and void.

This case turns entirely upon the question of the validity and regularity of the proceedings under the judicial attachment. Several objections are taken, and, we think, properly.

The first objection presented, is, that the judgment, by default, is void, for want of legal notice to defendants, of the suit against them.

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The provisions of the Code are as follows:

“As soon as the attachment is levied upon property of defendant, the Justice or Clerk of the Court shall make out, in pursuance of the order of publication, a memorandum or notice thereof, and cause the same to be published forthwith, in some convenient newspaper, according to law.” See § 3521.

Section 3522 provides: This memorandum or notice shall contain the names of the parties, the style of the Court to which the attachment is made returnable, the cause alleged for suing it out, and the time and place at which the defendant is required to appear and defend the attachment suit.

Section 3524 provides, that, the attachment and publication are in lieu of personal service upon the defendant, and the plaintiff may proceed, upon the return of the attachment duly levied, as if the suit had been commenced by summons.

From these provisions, it is clear that the attachment levied, and a publication, as required by section 3522, is necessary before complainant is authorized to “proceed as if suit was commenced by regular summons.” A publication of memorandum, or notice, not containing the requirements of said section, is not the notice required by law, and would give the Court no jurisdiction to render judgment against the parties sought to be charged. Does this notice comply with these sections? We think not.

It is as follows:

“Order of Publication, No. 2.—Jesse P. Nichols v. Henry Riley *et als*, now pending in the Circuit Court of Hancock County, Tennessee. It appearing that the

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defendants, Henry Riley, Hiram K. Riley, E. G. Anderson, G. B. Wallen, S. P. Riley and George Riley, are either non-residents, or so absconded, that personal service can not be made; it is therefore ordered that publication be made for four successive weeks in the *New Era*, a paper published in Greeneville, Tenn., notifying said defendants to appear at said Court on the 4th Monday in May next, and defend said suit, or they will be proceeded against *ex parte*.

“W. B. DAVIS, Clerk.

“By GEO. R. MITCHELL, D. C.”

Assuming that the above was duly published; though the fact nowhere appears in the record; it is, we think, essentially defective in several particulars.

It fails to show that the attachment had been levied on the property of the defendants, or that any attachment had ever been issued, against the property of defendants. It fails to show the cause or causes alleged for suing out the attachment. Without these requisites, the publication does not give the party that notice which is required by law, and it must be held that the Court acquired no jurisdiction to render judgment against the defendants sought to be brought into Court.

It is required by section 3523 of the Code, that the publication required by the preceding section, shall be made for four successive weeks, the last publication to be at least one week before the time fixed for defendant's appearance. It is insisted that this was not done in this case. Unless it was done, the Court had no power to proceed to a judgment in the case.

It does not appear, affirmatively, in the case, at what

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time, if at all, the publication was made, but assuming that it was made, as the law directs, after the levy of the attachment, then the thirty-five days required before the case could be proceeded in, had not elapsed, from the 27th of April to the 4th Monday of May, when the defendants were required to appear.

There are other objections urged in argument, but we do not think it necessary to notice them, the questions settled in this opinion being decisive in the case.

The attachment in the case will be dismissed, the case reversed and remanded for further proceedings in the Circuit Court, and all cost incident to the issuance of the attachment, and the cost of this Court, will be paid by defendants in error.

WILLIAM SULLIVAN, in error, v. JEHIEL FUGATE.*

1. ATTACHMENT. *Affidavit.* An affidavit for attachment which does not state the nature of the debt, whether by note, bill of exchange, or breach of contract, will not authorize the issue of the writ.

* At the same time with the above, the same Judge delivered opinions in *James M. Moneyhun, in error, v. Andrew Tarter*, holding an affidavit bad, which stated that the defendant "is indebted to me, the plaintiff, after giving all just credits."

JAS. T. SHIELDS, for plaintiff in error.

R. MCFARLAND, for defendant.

Also in *John A. Forgey, et als, in error, v. Peter M. Anderson*, where the cause of action stated was, that the defendant "is justly indebted to him, the plaintiff, to the amount of eighty-one dollars and twenty." The affidavit was held bad.

J. T. SHIELDS, for plaintiff in error.

S. T. Logan, for defendant.

William Sullivan a. Jehiel Fugate.

2. **SAME.** *Same.* An attachment issued on such affidavit, and all proceedings based thereon, without appearance, are void.
3. **SAME.** *Condemnation of land.* Judgment before a Justice of the Peace based on such affidavit, with attachment levied on land, and returned to Court, will not authorize condemnation of land.
4. **SAME.** *Same. Practice.* The proper practice is to dismiss the proceedings for condemnation.

Case approved. *Turner v. Ireland*, 11 Hum., 447.

FROM HAWKINS.

Writ of error from Hawkins County, JOSEPH M. LOGAN, J., presiding.

JAS. T. SHIELDS, for plaintiff in error.

S. T. LOGAN, for defendant in error.

FREEMAN, J., delivered the opinion of the Court.

This case was commenced before a Justice of the Peace for Hawkins County, by original attachment. The attachment was levied on the land of plaintiff in error; judgment rendered against him by the Justice for the sum of one hundred dollars and costs; the papers were transmitted to the Circuit Court, and there an order of condemnation was made, and the land directed to be sold.

From this judgment of condemnation and order of sale the defendant below prosecutes his writ of error to this Court.

The affidavit on which the attachment was issued is as follows: "Jehiel Fugate makes oath that William

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Sullivan is indebted to him to the amount of one hundred dollars, and that the said Sullivan so absconds and conceals himself, that the ordinary process of law cannot be served upon him."

This affidavit is essentially defective, and the proceedings under it are simply void.

Section 3469 of the Code provides that: "In order to obtain an attachment, the plaintiff, his agent or attorney, shall make oath in writing, stating the nature and amount of his debt or demand, and that his is a just claim;" and also, that one or more of the causes enumerated in section 3455 exist.

There is no statement of the nature of the debt claimed. It is true it is called a debt, but the words of the Code are "the nature of the debt or demand must be stated, as that it is due by note, account, for breach of contract, or the like;" nor is it stated that the debt is just.

These facts are required to be stated and sworn to, before the party can rightfully obtain a writ of attachment; the issuance of it, without this, makes it a process issued without any authority of law, and void.

It is insisted that this is an effort to attack the judgment of the Justice of the Peace collaterally, which cannot be done under case of *Turner v. Ireland*, 11 Hum., 447. We admit the correctness of the decision above quoted, but that was a very different case from this. In that case the judgment was sought to be attacked by extraneous evidence, and the motion to condemn the land, resisted on grounds sought to be shown by such evidence. In this case, the judgment under

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which the condemnation and order of sale of the land is sought, appears on the face of the proceedings, which are required to be made part of the record of the Circuit Court, to be absolutely void. No condemnation or order of sale could properly be made under these proceedings.

The judgment of the Circuit Court is reversed, the case dismissed, and the defendants in error will pay the costs of this Court and the Court below.

GEORGE GIBSON, Plaintiff in error, v. CALVIN CARROLL.

1. **LEADING PROCESS.** Where a plaintiff at the same time issued a summons and an attachment, the latter making no reference to the former, either in the affidavit or writ, an amendment of the summons is held to indicate that as the leading process in the case.
2. **SAME. Service. Judgment by default without.** There being no service of the summons in such case, a judgment by default without appearance is void.
3. **AMENDMENT.** An amendment changing the form of action from trespass on the case to trespass, is to be applied to the process in which trespass on the case is the form, there being one in which that was the form of action, and an attachment in which it was not. Cases cited: *Thompson v. Carper*, 11 Hum., 545; *Morris v. Davis*, 4 Sneed, 452; *Swan v. Roberts*, 2 Col., 153.

Appeal in error from the Circuit Court of Anderson County, SAM'L R. RODGERS, J., presiding.

BAXTER & CHAMPION, for plaintiff in error.

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GEORGE ANDREWS and J. R. COCKE, for defendants.

NICHOLSON, J., delivered the opinion of the Court.

The controlling question in this case, is, whether the leading process was a summons or an original attachment. It appears by the record, that, on the 16th of November, 1864, defendant in error issued his summons against plaintiff in error, and others, in trespass on the case, to his damage one thousand dollars. On the same day he made affidavit, that plaintiff in error and others were "justly liable to him in the sum of one thousand dollars, for property taken by the said parties, defendant, and that the parties have absconded from the State." This is the entire affidavit, no reference being made to the issuance of a summons; and upon this, he procured an attachment to issue against the estate of plaintiff in error, and others, which writ of attachment makes no reference to the issuance of a summons, but is in form and substance an original attachment. The summons and the attachment seem to have been issued on or about the same day, and both to have been received by the Sheriff on the 5th of December, 1864; and on that day the summons was returned "not found," as to all the defendants, and on the same day the attachment was levied on the lands of plaintiff in error, and returned. At the July Term, 1865, defendant in error asked and obtained leave to change his action from trespass on the case, to trespass *vi et armis*. This was a recognition of the summons as the leading process. At the March Term, 1866, judgment

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by default was taken, and a jury summoned to ascertain the damages, which was done, and a judgment rendered accordingly.

This statement of the case, as presented in the record, satisfies the Court that the leading process was a summons, and that the attachment was obtained as ancillary to the suit commenced by summons. It will be observed that at the date of the issuance of the attachment, the law did not authorize the issuance of an original attachment to recover for damages arising from torts. As an original attachment, therefore, it was a nullity; but the law did authorize an attachment in aid of a summons in cases of tort, and it was as an ancillary attachment, only that it could have any validity.

But as an ancillary attachment it is a nullity, for the reason that neither in the affidavit nor in the writ, is there any reference to the summons, which it was intended to subserve. *Thompson v. Carper*, 11 Humph., 545; *Morris v. Davis*, 4 Sneed, 452; *Swan v. Roberts*, 2 Cold., 153.

The judgment below is therefore reversed, the attachment dismissed, and the cause remanded to the Court below, to be proceeded in upon the summons.

Jesse J. Ingle v. Hannah J. McCurry, Administratrix.

JESSE J. INGLE v. HANNAH J. MCCURRY, Administratrix of E. R. HENDRY, and SAMUEL P. MCCURRY.

1. ATTACHMENT, ANCILLARY. *Summons*. Levy of an ancillary attachment, without service of the original summons, does not bring the defendant into court.
2. SAME. JUDICIAL. *Levy. Publication*. Without both levy and publication in due form, a judicial attachment will not support a judgment, unless the defendant appear.
3. SAME. *Record*. If the record does not show that the publication was in fact made, it is fatal to the proceedings.
4. SAME. *Judgment void. Remedy*. Such judgment will be perpetually enjoined by a court of equity, and a sale of land under it declared void.

FROM GREENE.

Appeal from the Chancery Court at Greeneville. S. J. W. LUCKY, Ch., presiding.

McFARLAND & McKEE, for Complainants. Cited *Bell v. Williams*, 1 Head., 229; *Ridgway v. Bank of Tennessee*, 11 Hum., 523; *Sheppard v. Brown*, MS. King's Dig., § 7592; *Walker v. Wynne*, 3 Yer., 62, as to power of Court to enjoin void judgment. As to void judgment—*Greenlaw, v. Kernahan*, 4 Sneed, 371.

No counsel appeared for defendants.

DEADERICK, J., delivered the opinion of the Court.

The bill in this case was filed in the Chancery Court at Greeneville, by Jesse J. Ingle, alleging that the said Hannah J., as administratrix of her husband, E. R. Hendry, deceased, had obtained a judgment against

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complainant and others, in the Circuit Court of Greene County, for \$2,500.

The suit at law appears from the transcript of the record filed in this case, to have been instituted, under our statute, for the killing of her husband, by Hannah J. Hendry, then the widow of the said E. R. Hendry, deceased, in May, 1865, by original summons and ancillary attachment, which were returned by the Sheriff to the June Term, 1865, of the Circuit Court. The summons was returned, "defendant not to be found," and the ancillary attachment, levied on certain lands of the other defendants, and on one tract of 107 acres, intended to be described as the land of complainant, Ingle.

No other process was issued to the next succeeding term, held in October, 1865. At the October Term, a judicial attachment was issued, returnable to the February Term, 1866.

In December, 1865, the said Hannah J. Hendry intermarried with her co-defendant, Samuel P. McCurry; but no notice seems to have been taken, in the record, of said marriage, and at the February Term, 1866, a judgment by default was taken against complainant and others, defendants in said suit at law, and a writ of inquiry awarded

At a subsequent day of the same term, a judgment final was taken, and a verdict rendered against complainant and others, in favor of Hannah J. Hendry, administratrix of E. R. Hendry, deceased, for \$2,500; and it was further directed that an order of sale be issued, and that the lands attached be sold for the satisfaction of said judgment.

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The lands of complainant were sold under said order of sale, and purchased by the plaintiff, Hannah, and her husband.

Upon the foregoing facts, it is insisted by complainant's solicitor that the judgment at law was absolutely void, and should be perpetually enjoined.

There was no service of the summons upon any of the defendants; and it has been repeatedly held by this Court that the only office of the ancillary attachment is to hold the property attached, for the satisfaction of the judgment, which may be rendered. It does not bring the party into court.

The judicial attachment, in a proper case for that process, and when all the requirements of the statutes are observed, performs the functions of both a summons and attachment. It gives legal notice to the defendant to appear and defend, and fastens upon his property, which is held to await the final judgment.

But in order to give it the effect of bringing a defendant into court, without actual notice of a pending suit against him, certain imperative requirements of the statutes must be complied with.

By section 3467, upon the return of a judicial attachment, duly levied, the cause proceeds in all respects as if originally commenced by attachment.

This requires that publication in some newspaper, notifying the defendant to appear at a time and place to be specified in the notice, should follow the levy of the attachment; and an order to this effect should be entered upon the minutes, or rule docket, of the Court. The published notice should also contain the names of

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the parties, the style of the Court to which the attachment is made returnable, the cause alleged for suing it out, and the time and place at which the defendant is required to appear and defend.

When the attachment is levied and the publication made, as prescribed, the law says they are in lieu of personal service of process; the failure to fulfill both conditions, is equivalent in its legal effect to having done neither, so far as it is attempted to use the attachment as a substitute for personal service of the summons.

Without both, defendant has not the legal notice prescribed by our statute as a substitute for personal service of notice; and a judgment rendered against him under such circumstances, is absolutely void.

Pretermittting, for the present, any decision of the question as to the effect of the failure of the plaintiff in the suit at law, to issue any process returnable to the October Term, 1865, there are other defects in the proceedings in the case at law, which are decisive of the case.

There appears in said cause an order, without date, directing publication to be made, but it does not appear that any publication whatever was in fact made.

The levy of the attachment and publication, should both appear affirmatively, to have been made as required by the statute.

The Chancellor held that the judgment at law was absolutely void, and perpetually enjoined the plaintiff therein from proceeding in any manner to collect the same from the said Jesse J. Ingle, the complainant in this cause; and declared the sale of said complainant's land, under said judgment, also void.

Morgan Lane, *et al.* v. Enoch Marshall, *et al.*

In this we hold there was no error. Let the defendant pay the costs in this Court and in the Chancery Court, and the decree of the Chancellor be affirmed.

Haskell.
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MORGAN LANE, *et al.* v. ENOCH MARSHALL, *et al.*

1. ATTACHMENT. *Of equity. Parties.* An equitable title is subject to attachment, but to reach it, the bill must seek to attach it as an equity; state the nature of the title; and make the holder of the legal title a party. Code, §§ 2084, 3500.
2. SAME. *Prima-facie on legal estate.* An attachment upon land, as the property of the defendant, will be intended to attach a legal interest, and if he has only an equity, a sale under it will convey no title.
3. LIEN. *Subrogation.* A purchaser, under a decree obtained without appearance of the defendant on such a bill, who has paid off a vendor's lien, will be subrogated to the vendor's right.
4. VOID SALE. *Remedy. Parties.* A bill will lie by another creditor, in such case, to declare the sale void, and subject the equitable title. On such bill, the Court will set aside the satisfaction of the original creditor's judgment, and sell the land so satisfy 1st, cost; 2d, vendor's lien; 3d the complainant's debt.
5. ATTACHMENT AT LAW. *Will not reach equitable estate.* An equitable estate is not subject to an attachment at law.
6. CONSTRUCTION. *Distinction between law and equity favored.* In constructing a statute, such a meaning will be given to it as will preserve the distinction between Courts of Law and Equity. See *State v. Alder, et als, post.*

FROM JEFFERSON.

From the Chancery Court at Dandridge, SETH J. W. LUCKY, Ch., presiding.

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BARTON, for complainant, insisted that an equitable estate could only be sold upon a bill, setting out the title and making the legal owner a party; and cited Code, §§ 3461, 3500; Drake on Att., §§ 232, 235, 244, n. 1; Peck R., 300; *Hervey v. Champion*, 11 Hum., 569; *Graham v. McCampbell*, Meigs, 52; *Green v. Demoss*, 10 Hum., 371.

No counsel for defendants.

NICHOLSON, C. J., delivered the opinion of the Court.

This is an original bill in the nature of a bill of review. Its object is to review a decree of the Chancery Court at Dandridge, rendered on the 12th day of April, 1865, in the case of Enoch and Benjamin Marshall against Wm. J. Johnson.

The allegations of this bill are, that, on the 6th of February, 1865, Enoch and Benjamin Marshall filed their attachment bill against W. J. Johnson, who was then a prisoner of war, at Johnson's Island, setting out an indebtedness of about \$800.00, and praying an attachment and sale of a tract of land described in the pleadings, as the property of said Johnson. That an attachment was levied on the land, and a decree made for its sale. That the land was sold on a credit of six months, free from the equity of redemption, and was purchased by said Enoch Marshall, at \$800.00, which amount was credited on the debt of Enoch and Benjamin Marshall. It is further alleged, that, at the time of the levy and sale aforesaid, the legal title to said land was in Benj. R. King, and that W. J. Johnson

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only held a title-bond therefor, a balance of about \$200 being still due to King, on the purchase money ; that King was not a party to the bill of attachment of Enoch and Benj. Marshall, and that the attachment bill was filed under the belief that the legal title was in Johnson, and that the land was attached as his property.

The prayer of the bill is, that the sale of the land under the bill of the Marshall's be declared null and void, and that it be subjected to complainant's claim. Enoch and Benjamin Marshall, in their answers, admit most of the allegations in the bill, and add, that when they found out, after the sale of the land, that there was a balance of purchase money due to King, they paid the same to him before the present bill was filed. They make no response to the allegation that Johnson was a prisoner of war, at Johnson's Island, when they attached the land and procured a decree for its sale. They admit, that, when they filed their attachment bill, they did not know that Johnson owed any part of the purchase money, nor did they know that he had no legal title.

From the allegations of the bill, and the admissions of the answers, it is apparent, that, when the attachment of Enoch and Benj. Marshall was levied on the land of Johnson, he had only an equitable title, the legal title being in King. But it was the legal and not the equitable title which was attached and sold, and purchased by Marshall. It follows that he obtained no legal title by his purchase, and unless the attachment fixed a lien on Johnson's equitable interest in the land, no title whatever was acquired by the purchase.

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It is well settled, that, whatever right or interest in property of a debtor, whether of a legal or equitable nature, would be affected by the lien of a judgment or execution, will, in like manner, be affected and made subject by the lien of an attachment. *Harvey v. Champion*, 11 Hum., 569.

It is equally well settled, ever since the case of *Shute v. Harder*, 1 Yer., 3, that the lien of a judgment or execution operates only on the legal title of lands, except in the cases provided for in 2084 of the Code. It follows that the levy of the attachment upon the land created no lien on Johnson's equitable interest, unless such lien was created by virtue of 3500 of the Code. By this section, attachments may be levied upon any real or personal property, of either a legal or equitable nature, in which the defendant has an interest. But, in order that an equitable interest in land may be subjected by attachment, the bill must be framed with that view, and the allegation must give to the Court jurisdiction to effectuate the object sought to be accomplished. It is not doubted that, if Enoch and Benjamin Marshall had known that Johnson had only an equitable interest, and that King had the legal estate in the land, they could have subjected Johnson's equitable interest, by making the proper allegations to give the Court jurisdiction, and by making King and Johnson both defendants. But upon their bill, simply alleging that Johnson was the owner of the land, and praying to have it subjected to sale, the only decree that could properly be made was to order a sale of the land; and such decree and sale, according to the allegations and prayer of the bill, would only communicate to the purchaser the

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legal title of Johnson. But as Johnson had no legal title, and as the decree did not operate on his equitable interest, the purchaser at the sale acquired no title.

It is manifest that the remedy by attachment has been greatly favored and extended by the late legislation of our State. Sections 3461 and 3500 of the Code greatly enlarge and extend the remedy by original attachment; but when properly construed, they do not alter the fundamental principles of equity jurisdiction, nor do they destroy the long-established rules which distinguish the proceedings in courts of law and of equity, in the exercise of their respective jurisdictions. It was not intended by § 3500 that attachments issued by courts of law might be levied on personal or real property of an equitable nature. Such a construction would destroy the harmony and symmetry of our judicial system, by converting the courts of law into courts of equity, in the enforcement of the remedy by attachment. The object of the Legislature was to give courts of law power to enforce the remedy by attachment, as to all property of a legal nature, and to give to courts of equity the power to enforce the remedy by attachment, as to all property, real and personal, either of a legal or equitable nature, debts or choses in action, whether due or not due, in which the defendant has an interest. By this construction we carry out the object of the Legislature, in extending and encouraging the remedy by attachment, and at the same time preserve the jurisdiction of each court within its appropriate sphere.

If Enoch Marshall obtained no title, legal or equitable, by his purchase under the attachment sale, the next

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inquiry is, as to the legal effect of his payment to King of the residue of the purchase money due to him. This payment was made before complainants filed their bill; but neither then nor since, has King conveyed to him the legal title; that still continues in King. It follows that the only effect of the payment was to substitute Marshall to the vendor's lien. It left the legal title still outstanding in King. It gives to Marshall the prior right of satisfaction for the amount so paid; but it does not remedy the defect in his title.

As Marshall obtained no title to the land, either by his purchase, or by his payment of the residue of the purchase money, the equitable interest of Johnson in the land, was subject to be reached by complainants for the satisfaction of their claims, and by filing their bill, and making the proper allegations and parties, they have secured the right to appropriate the equitable interest of Johnson to their debts, subject only to the amount of the purchase money paid by Marshall.

The decree below will, therefore, be reversed; the purchase of the land by Enoch Marshall set aside; and the amount of his bid, which was credited on the judgment, will not operate as a satisfaction of said judgment; the claims of complainants will be ascertained by a report of the Clerk and Master of this Court, the land be sold, and the proceeds applied, first, to the costs of this Court and the court below; next, to the reimbursement of Enoch Marshall of the amount, with interest, paid to King, and the residue to the satisfaction of the claims of complainants.

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ROBERT BROOKS & BRO. & CO. v. HARTMAN & STRAUS,
 ASA BAYLESS & Co., Attachment Bill; and DANIEL
 MILLER & Co. v. ASA BAYLESS & Co. Att. Bill

1. ATTACHMENT. *Firm. Member complainant.* Where an attachment bill is filed against a firm, the fact that one member of the firm of defendants joins in the creditors bill, does not affect the validity of the attachment.
2. SAME. *Unnecessary parties. Imperfect description.* Where the complainant in an attachment bill made the debtor firm defendants, by the individual names of the partners, and, also made several creditors defendants, by their firm names, with a view to give them an interest in the fund attached, it was held not to be material, they not being necessary parties.
3. SAME. *Bond. Defect. Amendment.* An attachment bond being signed in the firm name of the complainants, if defective, would be cured by the execution of a new bond, and the lien is not postponed to the date of the new bond. Code, §§ 3471, 3477.
4. BOND OF FIRM. But such bond, by the Code, § 1804, is good.

FROM GREENE.

From the Chancery Court at Greeneville. SETH J.
 W. LUCKY, Ch., presiding.

WM. H. MAXWELL, for Brooks & Bro.

S. T. LOGAN, for Miller & Co.

NICHOLSON, C. J., delivered the opinion of the Court,

This is a race betwixt creditors. Robert Brooks & Bro. attached the real estate of McBurney Broyles & Co., on the 16th of August, 1866, and Daniel Miller

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& Co. attached the same property on the 18th of August, 1866. The question is, which of the attaching creditors secured the priority of lien. It is conceded that Brooks & Bro. were prior in time, but it is insisted for Miller & Co. that on account of defects in the frame of Brooks & Bro.'s bill, and in their attachment bond, their attachment was a nullity.

The frame of the bill is anomalous in more respects than one, but that which is most seriously objected to is, that McBurney Broyles, one of the debtor firm of McBurney Broyles & Co., joins with Brooks & Bro. in charging fraud upon the firm of McBurney Broyles & Co., as the ground of the attachment. This singular proceeding is explained by the allegation, that Asa Bayless, the other member of the debtor firm, had already conveyed his property to his wife and children, to evade the payment of the firm debts, and that this act of fraud induced his partner, McBurney Broyles, to fear that he would also convey the real estate of the partnership for the same fraudulent purpose. Hence, McBurney Broyles, to give a preference to Brooks & Bro., who had specially befriended the firm, joined in the bill in the affidavit and in the attachment bond. Whilst this proceeding was unusual and anomalous, we do not see that it could affect the rights of Brooks & Bro.

It is next objected, that the names of the firm of Rob't Brooks & Bro., complainants, and of the several other firms, creditors of McBurney Broyles & Co., who are made defendants, are not set out in the bill, but that they are made parties by their firm-names. As to the names of the complainants, Robert Brooks & Bro., this

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objection is not well taken, their names being, in fact, set out full in the bill. As to the other firms made defendants, they were not necessary parties. The only necessary party was the debtor firm, of which Asa Bayless is made defendant by name. The other firms being creditors of McBurney Broyles & Co., might or might not be made parties defendant, in the discretion of the complainants. They were made parties for their benefit, if they should choose to avail themselves of any surplus that might remain for distribution, after complainant's claim should be satisfied. Amongst the firms, so made defendants, is that of Daniel Miller & Co., who filed their attachment bill two days after complainants had attached, and then came forward, make their appearance as defendants to complainant's bill, and demur thereto, because they were made defendants by their firm-name only, and afterwards file their answer, in which they insist upon the same objection. Whatever complaint the other firm, who neither appeared nor defended, might have reason to make, for the failure to set out their full names, surely Daniel Miller & Co. can have none on that score, since they appeared and made this defense. But the omission was not material as to any of the firms, as they were not necessary parties.

The next objection, is, that in executing the attachment bond, complainants signed their firm-name of Robert Brooks & Bro., instead of signing the names the firm, separately. The signature of Robert Brooks & Bro., is followed by a scroll, intended to represent a seal. Before granting an attachment, the applicant, his agent or attorney, is required to execute a bond in double the

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amount claimed to be due, and no attachment shall be dismissed for any defect in, or want of, bond, if the plaintiff, his agent or attorney, will substitute a sufficient bond: Code, §§ 3471 and 3477. Construing these provisions liberally, as we are required by § 3477 to do, we do not think the defect in the bond, if any defect, was such as to render the attachment a nullity, but that upon the execution of a sufficient bond, which, by the permission of the Chancellor, was done in this case, the complainant was entitled to the full benefit, of the lien of his attachment, on the 16th of August, 1866.

We have indicated that we do not regard the bond as really defective, for the reason that it was signed in the firm-name of complainants. The provision in the Code, § 1804, that "the addition of a private seal to an instrument of writing, hereafter made, shall not affect its character in any respect," abolishes so completely the distinction between sealed and unsealed instruments of writing, that we think the signature of the firm-name of Robert Brooks & Bro. to the bond, though followed by a private seal, was binding on the firm, and therefore it was a good bond.

Upon the hearing of the cause, the Chancellor was of opinion, and so decreed, that complainants were entitled to the relief prayed for. In this we concur with him, and affirm the decree.

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HENRY C. OGG v. A. L. LEINART *et al.*

1. ATTACHMENT. *Ancillary. Sale of land under.* A sale of land under a judgment based upon summons and ancillary attachment, which does not state the nature of the plaintiff's claim, or of his suit, without service or appearance, upon a publication which did not mention as defendant the owner of the land, held void.
2. COSTS IN CHANCERY. *Bond. Surety liable on reversal.* Complainant gave bond conditioned to prosecute with effect, or to pay the costs that may be decreed by the Chancery Court, on his prosecuting his suit there with effect, and a reversal here—security on the bond held liable for the costs, under Act of 1859–60, ch. 120.

FROM UNION.

From the Chancery Court at Maynardsville. O. P. TEMPLE, Ch., presiding.

E. C. CAMP, and M. L. HALL, for complainant.

W. R. EVANS, J. R. COCKE, and W. P. WASHBURN, for respondents.

NICHOLSON, C. J., delivered the opinion of the Court.

This bill was filed by the purchaser at execution sale, he being out of possession, against the possessor and others, claiming by subsequent attachment in equity.

Complainant seeks to remove the cloud from his title to a tract of land in Union County, by perpetually enjoining defendants from prosecuting their several attachment bills, in which they are seeking to subject the same

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land to a satisfaction of their claims against John Robertson, who is alleged to have conveyed the land fraudulently to W. W. Gibbs, whose title complainant alleges he procured by an attachment proceeding in the Circuit Court of Knox County. The case turns upon the validity of complainant's title procured by the sale of land under his attachment at law. He files in the record a transcript of his proceedings by attachment at law, and relies upon them for his title. It appears that he commenced suit by original summons and ancillary attachment. The summons was not executed on defendant, W. W. Gibbs; but the attachment was levied on his land in Union County; and upon this proceeding complainant obtained judgment, and had the land sold, and became the purchaser. If the Circuit Court had jurisdiction, he secured a valid title; if not, his title was invalid. The affidavit for the attachment is regular in all respects, except that it does not state the nature of his claim, or the nature of his suit by summons. The recitals in the writ of attachment are the same as the statements in the affidavit. After the levy of the attachment, an order of publication was made, which does not name William W. Gibbs as defendant; nor does it state the cause alleged for suing out the attachment.

Upon the authority of a long train of decisions by this Court, commencing with *Thompson v. Carper*, 11 Hum., 542, and continuing down to the present time, we hold that, on account of the defects in the affidavit, in the writ of attachment, and in the order of publica-

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tion, the Circuit Court acquired no jurisdiction of the person of W. W. Gibbs, and for that reason the title of complainant to the land is invalid and void.

On a motion to enter judgment for costs against the security for the prosecution of the suit below, the following opinion was delivered:

Complainant filed his bill, and entered into bond for the prosecution of the suit, with R. H. Harrison as his security. The condition of the bond is, that "H. C. Ogg shall prosecute with effect a bill in equity, this day filed by him in the Chancery Court at Maynardsville, against A. L. Leinart and others, or in case of failure therein, shall well and truly pay and satisfy all costs and damages that may be decreed by said Chancery Court.

Upon the hearing in the Chancery Court complainant was successful, and there was a decree in his favor, and a decree for costs against defendants.

Defendants appealed to this Court, and gave security for costs, and upon hearing the decree of the Chancellor was reversed, and complainant's bill dismissed with costs.

The question now presented is, whether the costs of this Court, as well as of the Chancery Court, can be adjudged against complainant and his surety in the prosecution bond. It is said that the surety's liability can not be extended beyond the terms of his obligation, and that by these terms, he was only liable in the event that his principal failed to prosecute his suit successfully in

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the Chancery Court. It is true, that, by the language of his undertaking, the surety only bound himself to pay all costs and damages that might be decreed by the Chancery Court. In a Court of law, this position would be unanswerable. But in a Court of Chancery, costs may be adjudged against a successful party and his surety, in the discretion of the Chancellor. In that Court, a party becoming surety for costs, undertakes with reference to this discretionary power of the Chancellor, and is subject to its exercise, whether his principal succeeds or not. *Allen v. Stevens*, 2 Head, 251. As the appeal vacated the decree below, and empowered this Court to rehear the case, the question of costs may be adjudged here, in the discretion of the Court; and in the exercise of that discretion, the costs of this Court, as well as of the Court below, may be adjudged against the complainant and his surety.

This view of the power of this Court as to costs, is sustained by the Acts of 1859-60, c. 120, p. 109, in which it is enacted that in all cases of bonds for the prosecution of original suits, or by appeal, *certiorari*, or writ of error, or where there is security taken of record in any of the Courts of the State, or before a Justice of the Peace, the security shall undertake to pay all costs that may be at any time adjudged against his principal, in the event it is not paid by the principal; and that no omission or neglect to insert the proper conditions in any such bonds, shall vitiate or impair the validity of the same. It must be presumed that every surety to a prosecution bond, executes the same with a view to his liability, not only under his bond, but under the

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law. In other words, the law becomes part of his contract, and imposes upon him the obligation to pay all costs that may be at any time adjudged against his principal; and no omission or neglect to insert the proper conditions in the bond, is to vitiate or impair the same. Under the provisions of this Act, as well as under the discretionary power of the Chancery Court, we hold that the costs in this case, of the Court below, and of this Court, are properly adjudged against the complainant and his surety.

JACOB C. SMITH v. WILLIAM BRAZELTON.

1. PLEADING. *Continuando*. A declaration in trespass averring "that, on the 1st day of January, 1864, and at divers other days, before and since that time, to the commencement of this suit," the defendant, with force, etc., took, etc., held to authorize proof of repeated acts of trespass.
2. SAME. *Aider by verdict*. If this were not so, it is an objection not affecting the merits, and can not, after verdict, prevail in this Court.
3. EVIDENCE. *Political opinions*. The political position of the parties, while in most cases foreign to the issue, may, in cases of circumstantial evidence, form part of the chain, and become legitimate proof.
4. SAME. *What will support verdict*. Proof that the plaintiff in error was a rebel; that he rode with rebel officers and soldiers across his own land, to a place of encampment common to both armies; that he pointed in a direction which might indicate the land of the defendant in error, or of other adjoining proprietors; that timber was cut off the land of defendant in error, without cutting any from that of the plaintiff in error; and that the property of the former was taken and that of the latter left, without testimony to show that these acts were done by the advice of the plaintiff in error, is no evidence to support a verdict against the plaintiff in error for trespasses committed by the soldiers.

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5. **TRESPASS.** *Person may divert impending evil.* If the plaintiff in error discovering that soldiers would encamp upon his own land, or that of the defendant in error, and would take the timber and property of one or the other; informed them that he was a rebel, and that defendant in error was a Union man, and requested them to take the property of the latter and to spare his, he incurred no civil responsibility.
6. **SAME.** *Advice to party who is justified.* If timber was cut, and other property taken, by the advice of a citizen, he can not be held as a trespasser, unless it appears that the act done was unlawful, and subjected the party advised to civil liability; and this defense may be relied upon under the plea of not guilty.
7. **BELLIGERENT RIGHTS.** *Confederate States.* During the war the Confederate States were entitled to the same belligerent rights as were the United States. Their armies, officers and soldiers, incurred no civil responsibility by encamping upon the lands of individuals, and using such timber and other property as was necessary to an army in camp. Their military commanders were the proper and only judges of this necessity; and what it was lawful for them to do, it was lawful for a citizen to advise.†

FROM JEFFERSON.

From the Circuit Court of Jefferson County, J. P. SWANN, J., presiding.

BARTON, W. McFARLAND and J. R. COCKE, for plaintiff in error.

THORNBURG, R. McFARLAND, MEEK and GRATZ, for defendant.

NELSON, J., delivered the opinion of the Court.

From the evidence in this cause, it appears the parties were the owners of adjoining farms, near the town of New Market, in Jefferson County; that in the month

† See *Cummings v. Diggs*, post p. —.

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of December, 1863, a force of rebel soldiers, under the command of General Vaughn, encamped for two or three days, and cut timber upon the land of defendant in error; and that in January or February, 1864, a brigade of rebel soldiers, under the command of Gen. Longstreet, also encamped for about three weeks, and cut timber off said land; that the place of encampment was a convenient one, and had been used at different times by troops belonging to the Federal and rebel armies; that the land, consisting of about ten acres, was very valuable, on account of the timber growing upon it; that of this the Federals had destroyed about two, and the rebels six acres, leaving two acres standing. It further appears, that, on the second occasion above mentioned, the rebels took some eight acres of standing corn, six or eight hogs, about two thousand pounds of hay, and about twenty dozen bundles of oats, and converted them to their own use.

This suit was brought, by original attachment, on the 14th of August, 1865. A declaration was filed in trespass, according to the form in use before the Code, and the plaintiff in error pleaded not guilty. The principal witnesses relied upon to connect him with the soldiers, and with the trespass, were Nancy Daily and Rufus Brazelton. The first of these witnesses stated that she saw Smith, the plaintiff in error, and some officers, riding along in front of her door, in New Market, going with rebel soldiers toward the camp-ground, in January or February, 1864; that the main army was ahead, and soldiers were in front and rear of him; that they went through Smith's field and woods, and she saw fires that

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night on Brazelton's land, but did not know whether Smith went with the soldiers into the timber. She stated further, that part of the soldiers had turned off toward the woods before Smith got to the turning-off place, and that most of the column were ahead of him. Margaret Daily states that she also saw him riding down street with some rebel officers, and saw the same number of men and horses, until they got into the timber; that she saw him make no signs as they were passing along, and that the soldiers were encamped "all around in the country." Rufus Brazelton, son of the defendant in error, states that the tents of the officers were on Smith's, and the main body of troops on Brazelton's land; and that, in December, 1864, Smith was riding in advance of some troops, and pointed up in the direction of this timber, and some of them went up there, at which time about one-half of the remaining timber was cut. Witness stated, on cross examination, that he did not see Smith with the troops there in January, 1864, and that when he saw him *pointing* with his hands, in December, he heard him say nothing; that he also saw Smith point toward the hill belonging to Gen. Brazelton (not the plaintiff) and Baker, and that he did not know that Smith ever said one word to the soldiers, about taking any of his father's property. On re-examination, witness said the soldiers camped, in December, on both sides of the road, in the direction Smith had pointed. It was also in proof that the soldiers, in going to their place of encampment, passed over Smith's field and a part of his woodland, and that during the winter, some of his timber was cut, and his fences burned. William

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Hammond, a witness for defendant, who owned adjoining land, testified that the Federal artillery first encamped upon the place in controversy, and on Smith's land, for about a week, and burned most of the fencing; that it was then occupied by, what the witness denominates, "the one hundred days' men, and next by Kirk's command, both of the Federal forces; then by Gen. Vaughn's command, of the rebel forces, and by Anderson's brigade, of Longstreet's army, also rebels; and that as many as three or four thousand men encamped there. It was further stated, by one witness, that the plaintiff, below, was a Union man, and defendant a rebel; which evidence was objected to by the defendant, but the objection was overruled by the Court, and exception taken by the defendant to the action of the Court. The charge of the Court to the jury, was not excepted to, and it is to be presumed that it was in all respects correct. Verdict and judgment were rendered in favor of defendant in error, for five hundred dollars and costs, and the case is before us upon appeal, in the nature of a writ of error, on the evidence alone, and upon the exception above stated, taken to evidence, and the objection made in the progress of the cause, to any evidence of different trespasses, from the trespasses first proven.

The declaration alleges, in the first count, that the defendant, "on the 1st day of January, 1864, and on divers other days and times, and before that day, between that day and the day of the commencement of the suit," with force and arms, &c., felled, cut down and destroyed, one thousand oaks, one thousand pines, &c., of

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the said plaintiff, &c. The second count alleges that, "on the 1st day of January, 1864, and divers other days, before and since that time, to the commencement of this suit," the defendant, with force and arms, &c., took and carried away five thousand cords of wood, of great value, &c., five hundred bushels of corn, &c. It is well settled that in actions, in form *ex delicto*, several distinct trespasses may be joined in the same declaration in trespass: 1 Chit. Pl., 200, m. The time is not material; and when several trespasses are stated to have been committed, on divers days and times, between a particular day and the commencement of the action, the plaintiff is at liberty to prove a single act of trespass, anterior to the first day, though he can not give, in evidence, repeated acts of trespass, unless committed during the time stated in the declaration: 1 Chit. Pl., 257; 2 Saund. on Pl. and Ev., 855, m. We are of opinion that the trespass is sufficiently laid with *continuando*, to let in the evidence as to several trespasses, and that there is no error in the action of the Court below, in refusing to limit the proof to the first trespass; but if this view were erroneous, the objection to the declaration, as framed, is so highly technical that it does not affect the merits, and can not, after verdict, prevail in this Court: See Code, §§ 2874, 4516.

While, in most cases, the political opinions of the parties are foreign to the issue joined, and inadmissible as evidence, we are not prepared to hold that, in a case like this, where the trespass was committed by soldiers, and the connection with it of the plaintiff in error, depended upon evidence purely circumstantial, it was not

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legitimate to prove the political relations of the parties, as part of the chain of circumstances, especially when those relations were proved by the personal knowledge of the witness, and not by vague rumors, in the nature of proof as to general character.* But, although we are of opinion that no error was committed in the court below, in the admission of testimony, we are thoroughly satisfied that his Honor, the Circuit Judge, ought to have granted a new trial, upon the evidence presented in this record. The proof that the plaintiff in error was a Rebel; that he rode with rebel officers and soldiers across his own land, to a place of encampment common to both armies; that he pointed in a direction which might indicate the land of the defendant in error, or of other adjoining proprietors; that timber was cut off the land of defendant in error, without cutting any from that of the plaintiff in error, and that the property of the former was taken, and that of the latter left, without one word of testimony to show that these acts were done by the advice, procurement, consent or connivance of the plaintiff in error—is so vague, indefinite and unsatisfactory, that we are constrained to hold there is no evidence to support the verdict.† The facts proved do not, in our view, create the slightest preponderance of evidence against the plaintiff in error, as they might well exist in perfect consistency with the idea of his innocence. On the suppo-

* See *Ellis v. Spurgin*, post p. 74; *Hart v. Reynolds*, post —; *Swaggerty v. Caton*, 16.† See *Parkey v. Yeary*, post —; *Witt v. Haun*, post —; *Lay v. Huddleston*, post —; *Nance v. Haney*, post —.

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sition that the rebel soldiers knew that the plaintiff in error was of their political faith, and that the defendant was not, it was natural and in accordance with the general usage in the late war, that they should endeavor to do him as little injury as possible, and that if loss and inconvenience were to be sustained, they would cause these to fall upon the person with whom they differed, rather than upon one with whom they agreed—upon their enemy in preference to their friend. And had it been established by positive proof, instead of conjecture, that the plaintiff in error, discovering that the soldiers were determined to encamp upon his own land, or that of the defendant in error, and *would* take the timber or property of one or the other, informed them that he was a rebel, and the defendant in error was a Union man, and actually requested them to take the property of the latter and spare his own, we do not regard it as our duty to hold that he incurred the slightest civil responsibility. An old case, almost analogous in the criminal law, establishes a precedent from which such a conclusion may, without violence, be drawn; for, “where two persons being shipwrecked, have got on the same plank, but finding it not able to save them both, one thrusts the other from it, and he is drowned, this homicide is excusable, through unavoidable necessity, and upon the great universal principle of self-preservation, which prompts every man to save his own life, in preference to that of another, when one of them must inevitably perish.” Broom’s Legal Maxims, 48; Law Lib., 6 m.; 4 Bla. Com., 186, m. But if the law of necessity, as applied to the saving of life, is inapplicable to the preservation of property, we hold, upon the

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facts of this case, and assuming that the jury were warranted in presuming that the timber was cut, and the other property taken, upon the suggestion or the advice of the plaintiff in error, that he can not be held as a trespasser, unless it appears that the act done by the party counselled or advised, was unlawful—a trespass—and subjected him to civil liability. This defense may be relied upon under the plea of not guilty. It is not a technical justification, but a defense growing out of the testimony introduced by the plaintiff below. It is part of the transaction on which his action is founded, and he could not be surprised by the evidence. It falls within the rule laid down in 2 Greenl. Ev., § 94, that “if the act of the defendant was done by inevitable necessity, as, if it be caused by ungovernable brute force, his horse running away with him without his fault; or, if a lighted squib is thrown upon him, and to save himself he strikes it off in a new direction; in these and the like cases, the necessity may be shown, under the general issue, in disproof of the battery.” In *Davis v. McNees*, 8 Hum., 40, which was an action of slander, the defendant was permitted to show, under the plea of not guilty, that the words proved were spoken under such circumstances that they were not actionable; and, we hold in this case, that whether the plaintiff in error acted under inevitable necessity or otherwise, if the acts established by the proof against him were not unlawful, he may rely upon this defense, under the general issue. See, also, *Gibbons v. Tarter*, 5 Sneed, 644.

The question then recurs: Was the plaintiff in error a trespasser upon the facts proved in the case, and liable to a civil action? We answer it by declaring that

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the act of taking and using wood, for fires for an army, under the circumstances of this case, is an act justified by the usages of war; that it grows out of an absolute necessity—a necessity that, so far as we know, was never doubted or questioned, as justifying the Federal army, under similar circumstances; and this presents the question as to whether, in the recent war, there was any difference in the rights of the two belligerents as to what acts each might perform, in the prosecution of the various operations of the war, in which they were engaged. The solution of this question depends upon various considerations; and, as there are other cases before us, in which similar questions are presented, we proceed to state our conclusions, and the process by which we have arrived at them, at greater length than would otherwise, seem to be demanded by the circumstances proved in this case. Aware that some conflict has existed, and still exists, in judicial opinions, as well as in the legal profession, in regard to various questions arising out of the war, and differing, as we do, to some extent, from the views promulgated by our immediate predecessors, it is alike respectful to others, and just to parties litigant, that the reasons for our conclusions should be presented with more than ordinary elaboration.

When the framers of the Constitution of the United States conferred upon Congress the power “to provide for calling forth the Militia to execute the laws of the Union, suppress insurrections, and repel invasions,” and when Congress passed the Act of 1795, (*chap.* 36, 1 *U. S. Stat. at Large*, 424,) and the Act of 1807, (*chap.* 39, 2 *Ibid.*, 443,) authorizing the President to call forth the Militia, and employ the land and naval forces, for the purpose of

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executing the laws and suppressing insurrection, it can not be reasonably supposed that either the members of the Convention, or of Congress, had it in contemplation that any insurrection, or rebellion, would ever attain the gigantic proportions of the late civil war; and, consequently, no provision was made for the contingency of a civil war, in contradistinction to an insurrection, or rebellion, as defined by Vattel, and recognized by the Supreme Court of the United States, in the Prize cases, 2 Black, 667-8. In the absence of any constitutional provision, or congressional enactment, the courts, and the text writers, have resorted, to the law of nations, for the purpose of obtaining a solution of the difficult questions growing out of the war; and, in the case cited; which was determined while the war was pending; the contest was declared to be, not an insurrection or rebellion merely, but "the greatest civil war known in the history of the human race." *Ib.*, 699. In that case it is said that, "Under the very peculiar construction of this government, the citizens owe supreme allegiance to the Federal Government; they owe, also, a qualified allegiance to the State in which they are domiciled. Their persons and property are subject to its laws. Hence, in organizing this rebellion they have acted *as States*, claiming to be sovereign over all persons and property within their respective limits, and asserting a right to absolve their citizens from their allegiance to the Federal Government. Several of these States have combined to form a new Confederacy, claiming to be acknowledged by the world as a sovereign State. Their right to do so is now being decided by wager of battle. The forts and territory of each of these States are held in hostility to

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the General Government. *It is no loose, unorganized insurrection*, having no defined boundary or possession. It has a boundary marked by lines of bayonets, and which can be crossed only by force; south of this line is enemies' territory, because it is claimed and held in possession by a hostile and belligerent power."—2 Black, 673—4.

Vattel, whose work on the Law of Nations is of the highest authority, says that, "when a nation becomes divided into two parties, absolutely independent, and no longer acknowledging a common superior, the State is dissolved; and the war between the two parties stands on the same ground, *in every respect, as a public war between two different nations*. Whether a republic be split into two factions, each maintaining that it alone constitutes the body of the State, or a kingdom be divided between two competitors for the crown, the nation is severed into two parties who will mutually term each other rebels. Thus, there exists in the State two separate bodies who pretend to absolute independence, and between whom there is no judge. They decide their quarrel by arms, as two different nations would do. The obligation to observe the common laws of war toward each other, is, therefore, absolute; indispensably binding on both parties, and the same which the law of nature imposes on all nations in transactions between State and State;" Vat., Book III, chap. 28, pp. 426—427, § 295.

It is thus shown that a civil war is, in its technical sense, a *public war*; and that, while it continues, the belligerents, so far as the laws of war are concerned, main-

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tain the same relation toward each other as independent nations in a public or regular war. The same great author says there are certain rules adopted by the voluntary law of nations, which may be briefly stated as follows: 1. That regular war, *as to its effects*, is to be accounted just on both sides. 2. That the justice of the cause being reputed equal between two enemies, *whatever is permitted to the one, in virtue of a state of war, is also permitted to the other*; and 3, that this voluntary law of nations, which is admitted only through necessity, and with a view to avoid greater evils, does not, to him who takes up arms in an unjust cause, give any real right that is capable of justifying his conduct and acquitting his conscience, but merely entitles him to the benefit of the external effect of the law and to impunity among mankind: Ibid. pp. 382-383, Book III, chap. 12, § 191. And in the same book, chap. 13, § 195, p. 385, it is repeated that "by the rules of the voluntary law of nations every regular war is, on both sides, accounted just, *as to its effects*, and no one has a right to judge a nation respecting the unreasonableness of her claims, or what she thinks necessary for her own safety."

It follows, therefore, that although municipal rights of sovereignty remained in the United States during the late civil war, and could be reasserted whenever and wherever the Government was successful in arms, yet, while the war was pending, and wherever the Government was unable to assert its authority, the belligerent rights of parties to the war, were precisely the same, and neither could, lawfully, assert any belligerent right superior to, or different from, the other. It is granted, in the Prize

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cases, that these rights were mutually conceded in the late civil war; and so much of the opinion in *Yost v. Stout*, 4 Cold., 208, as assumes, or seems to assume, that belligerent rights were *accorded*, from motives of humanity and policy, and as a concession by the Government of the United States alone, is founded in error, or should be qualified by the statement that, soon after the commencement of the war, the United States recognized it as a civil war, in which belligerent rights existed under the law of nations. It is well known that, in the commencement of the late civil war, the President of the United States was disposed to treat, as traitors, all who were acting under authority of the Confederate States. In the earlier stage of the war, the Government refused to agree upon a cartel for the exchange of prisoners, and it was declared, in Mr. Lincoln's Proclamation, of 19th April, 1861, that any person who should molest a vessel of the United States, under the pretended authority of the Confederate States, should be held amenable to the laws of the United States for the prevention and punishment of piracy, 12 U. S. Stat. at Large, 1258-1259. Under this proclamation, certain privateersmen, acting under commissions from the President of the Confederate States, who were captured by the United States, were taken into New York and Philadelphia, and indicted for piracy. Four of them were convicted, in Philadelphia, but never sentenced; while, in New York, the jury could not agree. These arrests led to retaliatory action on the part of the Confederate States, and in consequence of their threat to execute an equal, or greater number of prisoners, if the so-called pirates were punished, and also, in consequence

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of remonstrances of the British Government, the Government of the United States, on the 31st January, 1862, virtually receded from its position. See Law. Wheat., 253, 2d Ed; Tenney's Mil. and Nav. Hist. Reb. 61. After various negotiations, a cartel, for the general exchange of prisoners, was finally agreed upon, on the 22d of July, 1862; and under its provisions, those who were at first treated as pirates, were exchanged. M. and N. Hist. R., 323; 4 Law. Wheat., 593. The Confederate Government, on all occasions, negotiated with that of the United States, for the exchange of prisoners, on terms of perfect equality; and, in consequence of its ability to marshal large armies, the war, to all intents and purposes, was treated and carried on, by both belligerents, as a public war, in which each asserted and maintained, for the time being, the same belligerent rights. But we have been unable to find in any work to which we have access, any clear, concise, certain and accurate definition of the nature and extent of belligerent rights, as understood by writers on international law, and can only deduce them from the usage of nations and their general exercise under the laws of war.

During the existence of the civil war between Spain and her colonies, and previous to the acknowledgment of the independence of the latter by the United States, the colonies were deemed, by them, belligerent nations, and entitled to all the sovereign rights of war, against their enemy. 3 Wheat., 610; 4 *Ib.*, 52; 7 *Ib.*, 337; Law. Wheat., 42-43. Among these sovereign rights of war, may be classed the right to attack and capture or destroy the persons and property of the enemy; to destroy his commerce;

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to despoil and plunder his territory; to levy contributions; and to put in practice, against him, every method known in civilized warfare, necessary to weaken him.—1 Kent. Lect. V., 90-101, Vattel, book III, chap. 8, pp. 346-363.

Every nation, at war with another, is justifiable, by the general and strict law of nations, in seizing and confiscating all movable property of its enemy, of any kind or nature whatsoever, wherever found, whether within its territory or not; but the general usage now is, not to touch private property on land, without making compensation, unless in special cases, dictated by the necessary operations of war, or when captured in places captured by storm, and which repelled all the overtures for capitulation.—4 Kent, 91-92 m; *Ware, Adm'r, v. Hylton et. al.*; 3 Dal. 199; 1 Pet. Cond. R., 104.

This usage was adopted in the earlier stage of the Mexican war, in the instructions to General Taylor, to abstain from appropriating private property to public use, until purchased at a fair price; but was departed from, and military contributions levied, before the close of the war. 1 Kent, 92, 93, m. in note. And it was notoriously departed from by the army of the United States, in every Southern State, during the late civil war, and the private property of the citizens, whether friendly or unfriendly to the government, was taken and appropriated to the uses of the army, in most cases, without any compensation. The departure from this usage on the part of the United States, would have justified the other belligerent—the Confederate States—in the adoption of a similar course, in regard to the private property of any of the citizens of the United States residing out of the limits of the Con-

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federacy, but would not have justified taking, without just compensation, the private property of any citizen of the Confederate States, except in cases justified, as a military necessity, by the usages of war; because the Confederate States as a *de facto* government, were bound to protect their own citizens. Their right to follow the example of the United States, depended upon their equal rights as belligerents, and upon the law of retaliation. But, whatever may have been the actual practice of the two belligerents, there is no difficulty in ascertaining the laws of war as recognized by the United States. In the "Instructions for the government of the armies of the United States in the field," prepared by Francis Lieber, L.L. D., approved by the President, and published by order of the Secretary of War, April 24, 1863, General Orders, Volunteer Force, § 2, ¶ 37, p. 70, it is declared that, "The United States acknowledge and protect, in hostile countries occupied by them, religion and morality, strictly private property, the persons of the inhabitants, especially those of women, and the sacredness of domestic relations. Offenses to the contrary shall be rigorously punished. This rule does not interfere with the right of the victorious invader, to tax the people, or their property, to levy forced loans, to billet soldiers, or to appropriate property, *especially* houses, lands, boats or ships, and churches, for temporary and military uses." In the same book, p. 68, ¶ 22, it is declared that, "The principle has been more and more acknowledged, that the unarmed citizen is to be spared in person, property and honor, *as much as the exigencies of war will admit*," thus leaving a large margin to military necessity; and on p. 67, ¶ 17, it is said, "War is not carried

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on by arms alone. It is lawful to starve the hostile belligerent, armed or unarmed, so that it leads to the speedier subjection of the enemy." And in the further progress of the war, Major-General Halleck, Commander-in-Chief of the Armies of the United States, issued certain stringent instructions to the commanding officer in Tennessee, in which, among other things he said, "You have already been urged to procure your subsistence, forage, and means of transportation, so far as is possible, in the country occupied. This you had the right to do, without any instructions. As the Commanding-General in the field, you have the power to enforce all laws and usages of war, *however rigid and severe these may be*, unless there be some Act of Congress, regulation, order or instruction forbidding or restricting such enforcement." Law. Wheat., 2d Ed., Supplement, p. 40. Such being the laws of war, as recognized and promulgated by the United States, we hold that, during the war, it was lawful for the armies of General Vaughn, and General Longstreet to encamp upon the lands of defendant in error; and to cut down and consume the timber therefrom; that said military commanders in active service, were the proper and only judges of the propriety or necessity of taking and consuming the other property mentioned in the pleadings, and that, if it was lawful in them to take, it was lawful for the plaintiff in error, who was then within their lines, and sympathized with their objects in the war, to advise the taking; and that, in this view, no trespass was, either in law or in fact, committed. How the law would be if it were shown that the party giving the advice was animated solely by malicious motives, or personal

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hatred, or revenge; or how it would be, if there had been any proof that plaintiff directed the seizure of the corn, hogs and hay, it is unnecessary for us to determine, as there is no proof in the record to require such determination.

The right of the United States, through the army, to take and appropriate private property, in the late civil war, was fully discussed and carefully considered in *Taylor v. N. & C. R. R. Co.*, 6 Cold., 650, and it was held that even in friendly territory, the right exists under the general powers of the Government; and that the military commander is the proper judge of the necessity, and cannot be held responsible, in a civil tribunal; and, for the reasons already stated, we hold that, during the late civil war, the same principle was applicable to the armies of the Southern Confederacy. In the case just cited, the right of the Government to take and impress private property, for the use of an army in the field, and upon the actual theatre of military operations, was fully considered in the learned opinion of the Court. It was rested upon the police power of the nation, and declared to arise from its obligation to protect the national existence and the lives and property of its citizens; and, while the duty of the government to make compensation to those whose property has been taken and appropriated to public use, was distinctly recognized, it was held that this is not a condition precedent to the right to take property, or to the vesting of title thereto in the Government.—*Ibid.*, 651.

The duty of making compensation to their own citizens was, at all times, fully recognized and enforced by the Government of the Confederate States of America,

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and never departed from, so far as we are informed, except under the pressure of military necessity, and by armies engaged in actual hostilities. Citizens were paid for their property from the commencement of the war, and the right of impressment was regulated by statute. An Act was passed by the Congress of the Confederate States, approved March 26, 1863, entitled, "An Act to regulate impressments," and this was amended by An Act approved April 27, 1863; and still further amended by An Act approved February 16, 1864. These Acts provided for the impressment of private property, and its fair valuation in cases where the impressing officer and the owners could not agree, and for payment to the owner. Regulations were prescribed, from time to time, by the War Department of the Confederate States, for carrying said statutes into effect; and so late as March 7, 1864, in the regulations issued by "S. Cooper, Adjutant and Inspector-General," it was directed in § VI. that "No officer or agent shall impress the necessary supplies which any person may have for the consumption of himself, his family, employèes or slaves, or to carry on his ordinary mechanical, manufacturing or agricultural employments."

In the Constitution of the United States, Article V., it is provided that private property shall not be taken for public use without just compensation, and the same provision was contained in the Constitution of the Confederate States, Art. I., § 16.

It will thus be seen that both belligerents acknowledged in their fundamental law, the duty of making compensation; and this has always been considered as

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in affirmance of a great doctrine, established by the common law, laid down by jurists, as a principle of universal law, and founded on natural equity. Story Const., § 1790. But while the lawful Government of the United States and the *de facto* Government of the Confederate States mutually acknowledged, at least in theory, the application of this principle to their own citizens, the stern and rigorous doctrine recognized in the law of nations, that all movable property of their enemies, including private property, may be seized or destroyed, was practically adopted by both belligerents; and, as has been already announced, we hold that, in the late civil war, each party belligerent was entitled to the same belligerent rights. This doctrine is fully recognized, not only in the authorities before cited, but in Lawrence's Wheaton, 521, 522, text, and 523 in the notes, and is incidentally stated in Halleck's Int. Law, 458, 459, 464. It was declared, in another form, by the Supreme Court of the United States, long before our civil war, in the case of the *Santissima Trinidad and the St. Andre*, 7 Wheaton, 283; 5 Peters' Cond. R., 284. There it was held that, during the existence of the civil war between Spain and her colonies, and previous to the acknowledgement of the independence of the latter by the United States, the colonies were deemed by us, belligerent nations, and entitled, so far as concerns us, to all the sovereign rights of war against their enemy. And, in two cases determined by the Court of Appeals of Kentucky, in 1866, the same general principle was asserted and enforced. In the one, it was held that the capture of horses for the public

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use of the Confederate army, under military authority, express or implied, however wrongful in fact, was excusable as a lawful exercise of a belligerent right: *Price v. Poynter*, 1 Bush's Ky. R., 387. In the other, it was announced that the admitted laws of all civilized warfare entitle each party in a civil war, to the same right of capture or destruction of enemies' property, and show that when either the capture or destruction of property by one of such belligerents is lawful, it is equally lawful by the other; and if unlawful by one, it would be equally so by the other. *Bell v. Louisville and Nashville R. R. Co.*, 1 Bush's Ky. R., 404.

It was declared by this Court, in *Hammond v. The State*, 3 Cold., 236, that in the late civil war, the people were separated into two distinct and hostile societies, each, as belligerents merely, standing on the same level, and entitled, pending the contest, to the same rights of war, as against each other, that they would have been entitled to, had they both been independent sovereigns; and that they could alike take prisoners, capture property belonging to each hostile party, and deal with combatants, for the time, wherever the armies marched, as two sovereign and independent States. We fully approve the principle as there stated. The doctrine seems to have been greatly modified in *Yost v. Stout*, 4 Cold.: 205, where it was held that Yost and other Confederate soldiers, who had taken the wagon and mules of Stout, by order of the commander of the rebel force, were trespassers, and that the order was no justification. The case of *Yost v. Stout*, and the cases of *Davidson v. Manlove*, 2 Cold., 346, and *Wood v. Stone*, 2 Cold., 370,

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seem also to be in conflict with *Hammond v. The State*, and so far as they and similar cases in Coldwell's Reports are opposed to the views presented in this opinion, are overruled. The case of *Fottrell v. German*, 5 Cold., 580, in which it was held that a note executed by a Confederate surgeon, for the rent of a hospital building, was not illegal and void, as being in aid of the rebellion, is approved, so far as it goes, and it might, perhaps, be rested on firmer ground. The cases of *Wright and Cantrell v. Overall*, 2 Cold., 336, and other cases in which it was held that the Confederate or rebel Government was not a *de facto* Government, are overruled, so far as they are not in unison with this opinion. The doctrine that the rebels were insurgents, merely, and that the Government of the Confederate States of America was not a *de facto* government, involves, perhaps, the consequence that the United States might be liable to foreign Governments, and possibly, to their own citizens, for all their acts and liabilities, and we are not disposed to yield our assent to a doctrine fraught with consequences of such gravity and importance. Were it an original question, we would, without hesitation, declare that a government which assumed to form a Constitution, had a President and Cabinet in actual authority, a Congress that enacted laws, on most subjects of national legislation, and published them in due form and enforced them; which was recognized as a belligerent power, by two of the greatest nations on earth; was enabled to issue and keep afloat a currency; set on foot a navy that harrassed the commerce of the United States throughout the world; marshalled immense armies;

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fought great battles, and kept the power of the United States at bay for four years, was, to all intents and purposes, a *de facto* Government; and that it required no recognition on the part of the Government of the United States, to establish a fact well known to millions of people, and which will be transmitted to future ages, in every truthful history, that has been, or may be, written, of the war. But, for the present, we are satisfied to declare that *Wright and Cantrell v. Overall*, is in conflict with *Thorington v. Smith*, decided by the Supreme Court of the United States, and reported in 8 Wal., 1-15, where the Government of the Confederate States is expressly held, (pp. 9, 10,) to have been a *de facto* Government, or at least a government of paramount force. See *Sherfy v. Argenbright*, *post*.

Let the judgment of the Circuit Court, in this case, be reversed, and the cause remanded.

D. H. CUMMINGS, in error, v. RACHEL DIGGS, Adm'rx.

1. **BELLIGERENT RIGHTS.** *Seizure of arms.* The seizure by a Confederate Colonel within the Confederate lines, of arms, which could be made available for purposes of war, concealed, belonging to a Federal soldier, was justifiable under the belligerent rights of the Confederate States.
2. **SAME.** *Same.* To exclude evidence of the official character of the defendant, who, justified as an officer, under the Confederate States, was error.

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3. EVIDENCE PAROL. *To prove official character.* Parol evidence is admissible to prove that a defendant was a Confederate officer.

FROM ANDERSON.

From the Circuit Court of Anderson County, S. R. ROGERS, J., presiding.

BAXTER & CHAMPION, for Plaintiff in error, insisted that the Confederates had been held entitled to belligerent rights in the Prize cases. 2 Black, 673—4 and *Wood v. Stone*, 2 Cold., 374. Allegiance and protection correlative. Lawrence Wheat, 526, n.; Halleck's Int. L. & L. of War, 792; Bl. Com.

War defined, Vattel, 291, Mr. Justice Grier in the Prize cases; *The Hoop*, 1 Robs., R. 196.

Enemy relation, Mrs. Alexander's Cotton, 2 Wal., 419, Prize cases, Vattel, 321.

Subject of a Government, only responsible to his own sovereign for act of war, Mr. Justice Story in *Brown v. United States*, 8 Cr., 131 to 133; Vattel, 399 § 226.

What is lawful for one belligerent is lawful to the other in either a public or a civil war; which are subject to the the same rules, at least as to enemy's property and material of war.

Right to take private property was extensively practiced by United States armies in the late war. Sheridan in Shenandoah Valley. Sherman in Georgia, and in his march to the sea, and from Savannah to Goldsboro. Stoneman's raid to Salisbury, N. C., Lyons' in Missouri. Grant in West Tennessee and North

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Mississippi, and about Richmond. The seizure extended to everything that could be of use to the United States Army, or of advantage to the enemy, and what could not be taken was destroyed. The soldier was permitted to take what he chose, yet he could not be held responsible to the civil courts for this act. Ravaging not condemned by the laws of war. Vattel, p. 364, §§ 161, 167, 147, 165. Wheat, 596. Prize cases, *ubi supra*. Mrs. Alexander's Cotton, '2 Wall., 419. *Brown v. United States*, 8 Cr., 131, *et seq.*

GEORGE ANDREWS, for defendant, insisted that the parol evidence that the plaintiff was an officer, was inadmissible; but if properly proved, that the fact would be no justification, and cited *Hickman v. Jones*, 9 Wal., 197; *Cochran v. Tucker*, 3 Cold., 186; *Barnhill v. Phillips*, 4 Cold., 1; *Thornburg v. Harris*, 3 Col., 157; *Yost v. Stout*, 4 Cold., 205.

A military officer could not justify taking private property without showing military necessity. *Mitchell v. Harmony*, 13 How., 115.

J. R. COCKE, also for defendant, admitted that the parol proof was competent to prove the office of plaintiff in error, and cited 1 Greenl. Ev., § 92, but urged that the error was not material, as the plaintiff in error could not justify if he were such officer. Citing *Smith v. Isenhour*, 3 Cold., 214; *Yost v. Stout*, 4 Cold., 205.

NICHOLSON, C. J., delivered the opinion of the Court.

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This action was commenced in the Circuit Court of Anderson County, by summons and ancillary attachment, to recover damages from the plaintiff in error, for taking from John Diggs, intestate of defendant in error, five rifle guns, and converting them to his own use. Plaintiff in error put in two pleas—the general issue, to which there was replication—and the statute of limitations of one year, which was demurred to, and the demurrer sustained. He also gave notice of his real defense to be relied on, which was, “that the property and residence of the plaintiff, at the time of the alleged trespass, if committed, was within the military lines of the armies of the so called Confederate States of America, a military organization at open and public war with the United States, and that the defendant was an officer in the armies of the so called Confederate States of America, and as such, entitled to all the rights of belligerents, and that the intestate of the plaintiff was in the army of the United States at the time, and that said defendant, if he took said articles, took them as such belligerent, as he lawfully might.” The case was submitted to a jury who rendered a verdict against the plaintiff in error, on which judgment was entered, and from which he appealed in error to this Court.

It appears from the bill of exceptions that the plaintiff in error introduced a witness who proved that “Col. Cummings was Colonel of the 19th Tennessee regiment—witness had frequently seen him at the head of his regiment dressed as a Confederate Colonel—many officers had no commissions, but Colonels always had one.” The proof was objected to and excluded from the jury

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by the presiding Judge, on the ground that it was not the best proof of the fact that plaintiff in error was a Confederate Colonel.

We think the Court erred in excluding this evidence, but we concur with the counsel of defendant in error, that the error was immaterial, if upon the law it be true, that the fact of the plaintiff in error being a Confederate officer, and acting at the time in said capacity, could be no justification of the taking of the guns.

The facts of the case, upon which the question of law arises, are few and simple. About the time of the Fishing Creek battle, shown to be in December, 1861, ten Confederate soldiers came to the house of John Diggs, the intestate of defendant in error, in Anderson county, Tennessee, and demanded of the family arms. Whilst they were getting the guns out of a fodder stack, plaintiff in error rode up and directed the soldiers to take all five of the guns, which they did, and took them off, going in the direction of Fishing Creek. John Diggs, the owner of the guns, was proven to be a Federal soldier in the 2d Tennessee regiment, then absent in the Federal army.

These facts present the question whether the plaintiff in error, by virtue of his office of Colonel in the Confederate army, was justifiable in the exercise of a belligerent right in taking the guns, the property of a Federal soldier absent from home in the Federal army, the guns having been left at home in a place of concealment.

In the case of *Smith v. Brazelton*, ante p. 44, decided at

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the present term, we have deduced from the authorities therein cited, the following propositions, viz.:

1. The late contest between the United States and the Confederate States was a civil war, and so recognized by the Government of the United States from its commencement: 2 Black R., 635, in Prize cases.

2. Both parties in that case were entitled to the exercise of belligerent rights during its continuance: Vattel, 425; 2 Black, 635; *Coolidge v. Guthrie*, by Justice Wayne, at Cincinnati; *Hammond v. The State*, 3 Cold., 129.

3. Upon the breaking out of the war all the citizens within the limits of the territory occupied by the respective contestants, became enemies of each other respectively; and all the property within their respective boundaries became enemy's property as to each other. Vattel, 321-364.

4. The property of the opposing parties, whether on land or water, was subject to capture and confiscation. Vattel, 364.

5. As to the property of non-combatant or pacific enemies, the right of capture was limited to special cases, dictated by the necessary operations of the war, excluding, in general, the seizure of private property of pacific persons for the sake of gain, and the commanding military officer could determine in what cases its more stringent application was required by military emergencies. 1 Kent., 91; *Brown v. The United States*; 8 Cranch, 133; 2 Wallace, 419.

6. For the capture and confiscation of private prop-

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erty the military officer was responsible to his own Government only; and could not be made accountable in the civil or municipal tribunals. 2 Wallace, 419; *Coolidge v. Guthrie*, by Justice Swayne in 1868; 1 Kent, 120; Dana's Wheaton, § 356.

7. Private property, in which the hostile power had any interest, which property might be available for purposes of war, was *prima facie* a subject of capture: *Coolidge v. Guthrie*, by Justice Swayne; 2 Kent, 120; Dana's Wheaton, § 356; Vattel, 364.

8. Either party could lawfully capture and appropriate enemy's property within its limits, as defined by military occupation, whenever such seizure and appropriation was deemed necessary by the military authorities for the operation of the war. (Same authorities.)

Assuming the several propositions to be fully sustained by the authorities, as well as by many others that might be cited, it follows that it was competent for plaintiff in error to justify his taking of the five guns in the exercise of belligerent rights, they being enemy's property and such property as could be made available for purposes of war. It was, therefore, erroneous in the Circuit Judge to exclude the proof that plaintiff in error was a military officer at the time of seizing the guns. For that error the judgment is reversed and the cause remanded.

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SAMUEL B. ELLIS v. WILLIAM G. SPURGIN.

1. CONFEDERATE AUTHORITY. PLEADING. A justification by Confederate authority cannot be proved in trespass, under a plea of not guilty.
2. EVIDENCE. *Proximate Cause*. Where the house of a deserter from the rebel army was visited by a Confederate enrolling officer, with a squad of soldiers, whereupon he left home, and was absent about twenty months, the Court intimate that the absence cannot be attributed to the visit of the officer.
3. SAME. *Political opinion*. Loyalty and disloyalty admissible in evidence where the question is one affecting the actions of persons during the war, which may be controlled by their relation to the one party or the other.
4. CHARGE OF COURT. *On the facts*. To charge, that repeated efforts to *oust* a party, or repeated searches for him for that purpose, would be grounds of apprehension, and the party might abandon his home and hold him thus pursuing, liable to damages for ejecting or driving him from home, is an invasion of the province of the jury, and is error.

FROM WASHINGTON.

In the Circuit Court of Washington County, before
E. E. GILLENWATERS, J.

JAMES G. DEADERICK, for plaintiff in error.

R. M. BARTON and S. T. LOGAN, for defendants.

SHIELDS, S. J., delivered the opinion of the Court.

This is an action of trespass. The declaration states that the plaintiff sues the defendant for breaking and entering the plaintiff's close, and searching his dwelling house and premises, and also for wrongfully causing the plaintiff to leave his home, and to be absent therefrom

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for the space of two years, whereby he was greatly injured, and sustained damages to the amount of ten thousand dollars.

The defendant did not test the sufficiency of this declaration in law, as to substance or form, and only opposed to the allegation therein contained, and the demand made, the plea of not guilty, on which there was issue joined; upon the trial of which the jury found against him, and assessed the plaintiff's damage at one thousand dollars. The Court discharged a rule entered by the defendant for a new trial, and pronounced judgment on the verdict. The cause is here by an appeal in the nature of a writ of error.

The plaintiff in error might possibly have maintained a special plea in confession and avoidance; for the record discloses that he acted under the authority of the government, and the only government which at the place and time was existing, and which was enforcing, absolutely, obedience to its authority and laws. But he did not, by his pleading, present this question to the decision of the Court, and relied alone upon such defense as the law permits under the general issue in this form of action. It appears that the defendant in error had deserted the rebel army, and that the plaintiff in error, who was an enrolling officer, visited the house of the former, accompanied by soldiers, for the purpose of arresting him; that information of this fact was given him, in consequence of which, says a witness, he left the country, and was absent about twenty months. We doubt whether the long-continued absence of the defendant in error was the natural consequence of the

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act of the plaintiff in error, so as to warrant a verdict for damages on that ground. It is well settled that all damages must be the natural and proximate consequence of the act complained of; and can it be said, with any degree of fairness, that the defendant in error remained from his home on account of this act of the plaintiff in error? We think not.

It is shown that, in the progress of the trial, a witness was allowed to state that *other* soldiers, with whom the plaintiff in error had no connection, went to the house of the defendant in error, for the purpose of arresting him; also, that the Court permitted the defendant in error to prove that he was loyal, and that the plaintiff in error was disloyal to the Government of the United States—all of which evidence was, at the time, objected to; and it is now insisted that in this ruling there is reversible error. In view of subsequent qualifying instructions of the Court to the jury, and of the peculiar character of the question of fact in issue, we can not so hold.

But we find in the charge of the Court the following: "Continued or repeated efforts to *oust* a party, or repeated searches for him for such purpose, would be grounds for a reasonable apprehension of danger, and the party thus pursued might abandon his home, and hold him thus pursuing or searching liable in damages for thus *ejecting* or driving him from his home."

This instruction involves an invasion of the province of the jury, so direct, and an infraction of that provision in our organic law, which declares that judges shall not charge juries with respect to matters of fact, so clear

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and palpable, that we are constrained to reverse the judgment, and remand the cause for another trial.

The proposition of fact to be maintained and established by the plaintiff below, was, that the defendant there had done such acts as would naturally produce and cause the injury complained of. It was a question of fact, to be determined by the jury; yet the Court there informed the jury that certain specific facts would amount to proof of the issue on the part of the plaintiff. Independent of the prohibition in the Constitution, we should condemn this instruction; for it is an ancient rule, that whether there be any evidence or not, is a question for the Judge; whether it is sufficient evidence, is a question for the jury. The Judge may decide what is *evidence*, but it is for the jury to say what is *proof*. But when the Judge told the jury that certain acts would be grounds for a reasonable apprehension of danger, and that the party thus pursued might abandon his home, and hold him thus pursuing liable in damages, he clearly charged the jury with respect to the matters of fact. It was for the jury, and not the Judge, to say what would be such reasonable grounds of apprehension as would induce a man of ordinary firmness and discretion to so abandon his home as to entitle him to maintain an action against the party whose wrongful and unauthorized acts induced that apprehension. It is well known to those of us who have had experience in investigating questions of fact before juries, that very slight intimations from the bench have a commanding influence over the jury; and judges presiding at such trials should sedulously avoid an expression of opinion, further than

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to declare the law; otherwise the trial by jury, so highly valued by the English and American people, will become but an empty and ridiculous form. We think that the presiding Judge, in the trial of this cause, so erred, doubtlessly, by inadvertence, but, nevertheless, to the injury of the constitutional rights of the plaintiff in error, to have the free and unbiassed judgment of his peers on facts of the cause.

BIRD D. BAYLESS, in error, v. J. A. ESTES.

1. JUSTIFICATION. *Belligerent Rights.* In an action of trespass, a plea, which attempts to justify an act under the belligerent powers of the Confederate State, is defective if it fails to show the defendant was a soldier. That he was "liable to perform military duty" is not sufficient.
2. PLEADING. *In Trespass, justification to be pleaded.* If a soldier could justify under the laws of the Confederate States to compel the service of citizens in the armies, the laws and order under which he acted must be pleaded specially.
3. EVIDENCE. *To rebut what is excluded. Error.* Material evidence admitted as rebutting to what was excluded by the Court, is a cause for a new trial.

FROM WASHINGTON.

From the Circuit Court of Washington county, before E. E. GILLENWATERS, J.

NELSON and DEADERICK, Js., being of counsel, did

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not sit in this cause, SHIELDS and MCFARLAND sitting for them.

J. G. DEADERICK, for plaintiff in error.

R. M. BARTON and S. T. LOGAN, for defendant.

R. MCFARLAND, S. J., delivered the opinion of the Court.

This was an action for false imprisonment, in which the plaintiff recovered, and a new trial being refused, the defendant has appealed in error. The defendant pleaded not guilty, and a special plea of justification. To this latter plea a demurrer was sustained by the Court below, and whether or not the action was erroneous is one of the questions in the cause.

This plea avers the existence and pendency of the late civil war between the United States and the so-called Confederate States, and that the defendant was a private soldier in the army of the latter power; and "that while said civil war was still pending and undetermined, and while the said defendant was acting under the authority of said Confederate States under the orders of his superior officers, who were acting likewise under said authority, he, the said defendant, as an act of war, committed the supposed acts of trespass, (if they were committed at all,) in order to compel the said plaintiff to perform military service in the armies of the so-called Confederate States, he being liable, under the laws and orders of the said Confederate States, and to the military orders thereof, to render military service."

It may be as safely assumed that the armies of the

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so-called Confederate States carried on the late war with the United States mainly in accordance with the usages and customs of civilized nations, and became entitled, pending the contest, to the rights of belligerents; and we would not be inclined to hold that a soldier of the late Confederate army could be held, civilly, liable to the courts of the country for an act which is in itself a legitimate act of war, according to the customs and usages of civilized nations, and which was done in obedience to the orders of his superior officers in said army, when the defense is properly presented by a plea.

We should further hold that a deserter from the rebel army could not maintain this action, against another soldier of that army for arresting him and returning him to his command, under orders of his officers, where this defense is properly pleaded—the right to enforce discipline and obedience among its own soldiers being one of the clearest rights which the belligerent power possessed. Judging from the proof in the record, this was the defense intended to be relied upon by the plaintiff in error; but the plea in question does not, we think, properly present this defense. It is not averred that the plaintiff below was a soldier in the rebel army, but that he was liable to perform military duty in said army under the laws and orders of said Confederate States, by the military orders thereof.” In the case of *Jones v. Hickman*, 9 Wallace, it was held that the laws of the said Confederate States were a nullity and no justification for any act performed in obedience thereto, and could not be recognized by the courts. Whether the enforcement of the law by the military power would be a valid

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defense, we need not determine. To raise this question, the laws and orders under which the plaintiff in error professed to have acted, should have been more distinctly and specifically pleaded. We are, therefore, of opinion that the demurrer was properly sustained.

It is next argued that a new trial should be granted because of the admission of illegal testimony.

The arrest complained of occurred, as proven by the plaintiff himself, about the month of August, 1863. The defendant introduced proof tending to show that the plaintiff had belonged to the rebel army previous to this time, and had deserted, and the arrest in question was made under general orders to arrest deserters. The Circuit Judge in his charge told the jury that the demurrer to the plea of justification having been sustained, evidence cannot be looked to in justification, and is not allowed for that purpose. His Honor told the jury that in mitigation of damages they might look "to the circumstances under which the arrest or imprisonment was had as to whether there was the absence of wantonness and malice." To all this there could be no just exception, but the plaintiff below was permitted to introduce as rebutting testimony against objection that previous to the arrest in question, in February, 1863, he was brought before an examining board, who refused to exempt him, and refused to allow him choice of commands, and in the proof, the conversation and declarations of the board were admitted, as was also the conversation then had between the witness and the plaintiff. Also, by another witness, David Wilds, that one evening he met Estes where he

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was secreted. He said he was trying to make his escape from the rebel army; that his only chance to keep from going to Vicksburg was to volunteer under Byers; that he had got a furlough and was trying to escape. He said he wanted to get away because he did not want to go into the rebel army and did not want to stay in it. He was also permitted to prove by Thomas Collins that on the way from Strawberry Plains to Loudon, Estes said he had been tied and brought there in strings, like a horse-thief, and did not believe in the d—d Confederacy, and would leave as soon as as he could, *etc.* All this was admitted as rebutting testimony over objection. There was other testimony of the same character. The testimony of the plaintiff in error going to show that Estes was in reality a rebel soldier, being matter tending towards a justification, was excluded by his Honor's charge, and this question was not before the jury, and consequently there was nothing to rebut. It will be observed that his Honor did not instruct the jury that they might look to the proof of the defendant, as to Estes, the plaintiff, having been a rebel soldier in mitigation of damages, and it was improper to admit this rebutting testimony to aggravate the damages, for it is not alleged that the plaintiff in error was present at the time of these occurrences, or was in any manner connected therewith. We see no evidence in the record, which by his Honor's charge was allowed to go to the jury, to which the above testimony can be regarded as rebutting, and we think it was improperly admitted. How far it may have prejudiced the plaintiff in error we can

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not see—but under the facts of the case we regard the error as a material one, and for this, reverse the judgment, and remand the cause for a new trial.

WILLIAM R. CROSS, Guardian, *etc.*, v. GEORGE W. SELLS, *et al.*

CONFEDERATE TREASURY NOTES. *Payment in, executed.* To bring a payment in Confederate currency, made on a note, within the rule as to executed contracts, it is not necessary that the payment be of the entire sum due, nor that it be indorsed as a credit on the note.

FROM SULLIVAN.

Action of debt, from the Circuit Court of Sullivan County. E. E. GILLENWATERS, J., presiding.

F. W. EARNEST, for plaintiff. Cited 4 Cold., 275, 283, 301, 327; 2 Cold., 336; 5 Cold., 465.

J. T. SHIELDS, for defendant.

TURNEY, J., delivered the opinion of the Court.

There is no error in the record. The suit was commenced in the Circuit Court of Sullivan County, upon the following note:

“\$416.

“One day after date, we or either of us promise to pay Eliza Akard, guardian for Sarah R. Akard and

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Oldridge D. Akard, minor heirs of James Akard, deceased, four hundred and sixteen dollars, value received.

“Witness our hands and seals, this 13th day of September, 1858.

“(Signed,)

GEORGE W. SELLS,	[Seal.]
“JOHN W. SELLS,	[Seal.]
“MCJ. GALLAGHER,	[Seal.]
“L. J. DRYDEN,	[Seal.]
“WM. D. BLEVINS,	[Seal.]”

On the back of the note are the indorsements:

“Received of John Sells, one hundred dollars, Confederate money, this 1st day of April, 1861.”

“Received on the within note, \$1.80, this 11th day of May, 1861.”

“Received of John Sells, two hundred and ninety dollars in Confederate money, June 4, 1863.”

There is no controversy about the facts. The Confederate currency was voluntarily received by the plaintiff.

The verdict of the jury was: “The defendants have paid the debt in the declaration mentioned, except the sum of ninety-eight dollars and five cents.”

Judgment was rendered upon this verdict. Plaintiff moved for a new trial; the motion was overruled, and he prosecutes an appeal to this Court.

By the verdict and judgment, credits were allowed for the Confederate money.

In his charge to the jury, his Honor the Circuit Judge, said: “A payment on a note, voluntarily accepted by the holder, is a credit to the extent of the payment; if said payment is voluntarily entered upon a note, though in Confederate money, yet it is good, and will bind the parties.’

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In this charge there is no error of which the plaintiff can be heard to complain. To entitle the debtor to a credit for the amount paid, the actual entry on the note is not necessary; he may prove such payment *aliunde*.

It is only necessary that he show, by competent testimony, that he paid, and his creditor received, the Confederate money upon the understanding, expressed or implied from the circumstances connected with the payment, that it was to be a payment on the note or other indebtedness of the payor to the payee. And when a party has voluntarily agreed to and did take Confederate money in payment, he is bound by his action, and will not be heard to complain.

It is insisted in argument that partial payments in Confederate money, as these were, are no payments; that such payments are not executed contracts. We do not concur in this view of the law. We hold the rule to be, that the note is a contract, entire in itself, for the payment of money at a fixed time; that still an offer made, either before, at, or after the maturity, to pay, and an acceptance of such offer, and a payment thereunder, is a full, complete, independent and executed contract. The holder of a note is not required in law to accept a tender of an amount less than his debt and interest; such tender will subject him to no loss of interest, nor to any costs. He is in no way affected by it until he does accept it; the consent of both parties is necessary to it. Therefore, when the debtor says to the creditor, "I will pay you a certain amount on my indebtedness," this is an offer to contract. If the cred-

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itor says, "I will recieve it," this is a contract; and if the debtor pays the amount, it is an executed contract. Every essential necessary to any contract is contained in these partial payments to-wit: Parties able to contract, willing to contract, and that do contract.

Judgment affirmed.

THOMAS HAYS v. JOHN CRAWFORD.

1. EVIDENCE. *Practice.* Admission of evidence on the part of the plaintiff, not strictly rebutting, after evidence for the defendant is closed, is matter in the discretion of the court below.
2. SAME. *Petition for discovery.* Answer to a petition for discovery may be read or not, by the party calling for it. It must be shown that it was read and made part of the bill of exceptions.
3. CONFEDERATE NOTES. *Query.* Is the fact that a note is given in consideration of Confederate notes, a defense?
4. ERROR. Party can not complain of errors in his favor.

FROM GREENE.

From the Circuit Court of Greene County. E. E. GILLENWATERS, J., presiding.

The bill of exceptions recited that the plaintiff read, in opening, the petition for discovery, answer and note sued on, but it did not state that the answer was made part of the bill of exceptions.

The evidence introduced at the close of the defendant's case and excepted to, was that of Nathan E. Craw-

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ford, the son of the plaintiff, who testified that his father held two notes on the defendant, the one sued on in this case, and another executed about the same time; that he didn't see all the money loaned; that he saw no Confederate money; it was rolled up when he took it to defendant and brought back the note therefor.

J. G. DEADERICK, MAXWELL and EARNEST, for plaintiff in error.

S. T. LOGAN, for defendant, cited *Thorington v. Smith*, 8 Wal., 12.

SHIELDS, Special J.; sitting in place of DEADERICK, J., of counsel; delivered the opinion of the Court.

The action is on a note, payable in current money. The plea is, that the note was made in consideration of Confederate Treasury notes.

The verdict and judgment were for the plaintiff. On the trial the Court permitted the plaintiff below to examine a witness, after the evidence of the defendant had been closed, whose testimony was not strictly rebutting testimony. This is assigned as error. We do not think that it is. The matter was one within the sound discretion of the Court. There is nothing in this record to show that it was improperly exercised, and the presumption is in favor of the validity of the proceeding.

It is insisted that the judgment should be reversed, because it is not sustained by evidence. We do not concur in this view of the case. The answer to the peti-

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tion for discovery is not made a part of the bill of exceptions; and, as it was not necessarily read as evidence, it being competent for the defendant to read it, but not for the plaintiff below, it is not a part of the record, and can not be looked to. The testimony of the witnesses examined is conflicting, and granting that the weight of evidence is against the verdict, there is not such a preponderance as to bring the case within the rule which this Court applies to the decision of the question.

Besides, we are by no means satisfied that the plea is a valid defense to the action, if true. The verdict and judgment are for the full amount of the note. In the absence of proof to the contrary, the presumption is that the verdict of the jury is correct. The errors in the charge of the Court are all clearly such as the plaintiff in error can not complain of, because they are in his favor.

Affirm the judgment.

JAMES WILLIAMS v. JOSEPH ELKINS *et al.*

1. CONFEDERATE NOTES. *Sale for.* A party who has sold and delivered personal property upon an agreement to take payment in Confederate Treasury notes, can not, upon a tender of the Confederate notes, refuse to accept them and bring detinue or trover for the value of the property.

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2. SAME. *Question reserved.* Whether he can recover for the value of the property, query?

CASES CITED. *On sale and delivery.* Meigs R. 22; 2 Hum. 298; 5 Hum., 108.

FROM CAMPBELL.

From the Circuit Court of Campbell county. O. P. TEMPLE, Ch., presiding.

BAXTER & CHAMPION, for plaintiff.

E. C. CAMP and L. C. HOUK, for defendants.

SNEED, J., delivered the opinion of the Court.

The plaintiff brought his action of replevin in the Circuit Court of the county of Campbell to recover a chattel described in the pleadings as a Cast Iron Cane Mill. The verdict and judgment were for the defendant. The plaintiff appealed. He insists that the verdict and judgment are contrary to the law and evidence, but he has assigned no error of law in the charge of the Circuit Judge, nor is the charge itself incorporated in the bill of exceptions. We are to assume that the Court gave the jury a correct exposition of the law as applicable to the facts of the case, and we are to determine it upon our convictions of the law.

The rule of this Court as to granting new trials upon the mere facts of a case has been so often reiterated since it was announced in the early case of *Kelton v. Bevins*, Cooke's R. 90, 109, that it has become al-

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most an axiom of our law, that this Court will not disturb the judgment of an inferior court in granting or refusing a new trial in civil cases, unless it *very clearly* appear that the inferior court has erred. That the authority of this Court to invade the province of a jury ought to be used with extreme caution and should indeed never be used except in very clear cases, leaving those merely doubtful, to rest where the jury left them. *Whites' lessee v. Hembree*, 1 Tenn. R., 529 *et seq.*

In the case now in judgment, the original writ is in replevin, and the return shows that the process was served upon defendant, but the possession of the property was not obtained by the Sheriff. The plaintiff had leave to amend his declaration, and it seems that a count in trover was inserted. Under the Code, where possession is not had under the writ of replevin, and defendants are summoned, the plaintiff may elect to proceed in case or detinue, and the cause shall be conducted as if the leading process had been in one of those forms. Code, § 3388.

This is, in legal effect, an action of detinue, to try the title to the chattel in controversy, with a count in trover, which, in this case, involves the same question. The doctrine of the law regulating these actions, is so familiar, that a mere statement of the principles applicable to this case, is only demanded here. The action of replevin or detinue will lie wherever the goods of another are wrongfully held or detained from him, whether the possessor obtained possession of them rightfully or wrongfully. The action of trover assumes that there has been an unlawful appropriation or conversion

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of the plaintiff's goods, to the use of the defendant. To constitute a conversion, some act must be done in reference to the property, in derogation to the owner's right of control and dominion over it. 1 Chitty's Pl. 153; 1 Greenl. Ev. § 642; *Scruggs v. Davis*, 5 Sneed, 265.

The case at bar presents a state of facts, which, in the opinion of the Court, well warranted the verdict of the jury and the judgment of the Circuit Court.

The plaintiff, about the last of July, 1863, bargained and sold the chattel in question to the defendants, and agreed to take two hundred dollars in Confederate money. The real value of the property at the time of the contract, in good money, was proven to be seventy-five dollars. The defendant, Elkins, who was contracting for himself and the defendant, Vinsant, was told by the plaintiff at the time of the sale, that the cane mill was in an outhouse on his farm. That he, the defendant, Elkins, could go and get it at any time, and that he could pay him the money at any time. The witness who testified as to the trade, was called to witness it, and did witness it. He saw the property some weeks afterward, in the possession of the defendants. It also appears, that, soon after the siege of Knoxville, the defendant tendered the amount of Confederate Treasury notes contracted for, to the plaintiff, who declined the same, observing that "the time for Confederate money has passed." In the conversation that occurred at the time of the tender, nothing was said about the terms of the contract. The mill was spoken of, but there was no denial of the bargain.

On behalf of the plaintiff, it was shown, that, toward

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the latter part of August, 1863, the defendant, Elkins, went to get possession of the mill, and demanded the same of witness, Peterson, who, it seems, was plaintiff's agent on the farm, and Peterson declined to deliver it, remarking that he had no authority to do so. Some days afterward, Peterson saw Elkins hauling the mill away. He gave him no authority to do so.

The plaintiff has proceeded upon the idea that the contract was, in its inception, void, as it was a contract to give and receive Confederate money as the consideration for the chattel sued for. In the absence of the charge of the Court, we are not permitted to speculate as to the doctrines of the law announced by his Honor for the guidance of the jury. It might have been held, perhaps, that even if the contract was *ab initio*, void, yet the transaction shows the parties *in pari delicto*, and that, according to the well known maxim, where each party is equally at fault, the law favors him who is in possession. *Rider v. Kidder*, 10 Ves. 366; *Smith v. Bromley*, Doug. R., 696. Or that in view of the tender made by defendants, this was an executed contract, which, in this form of action, would not be disturbed. 3 Cold., 472. Or, that the contract was executed so far as plaintiff was concerned, and that defendant's right of property could not be disturbed. Story on Con., §§ 18, 19 and 20. Or, it may be, that the convictions of the Court were identical with those governing this Court in the disposition of the cause.

In the view this Court has taken of the case, the question as to the validity of the original contract does not arise. Nor is it incumbent upon us, here to pro-

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nounce upon the plaintiff's right, in an appropriate action, to recover the value of the property in controversy.

The plaintiff, though it seems he made an injudicious bargain, had, nevertheless, the right to make his own contracts, and we are to assume that he was fully capable of contracting, and that the trade was upon his own judgment and reckoning, unaffected by duress, and without the semblance of fraud or covin on the part of the defendants. It was a venture on the part of the plaintiff, which, as a speculation, depended upon the result of our late unhappy civil war, and which might or might not have brought him back a good return. The sale of the chattel was complete the instant both parties had agreed upon its terms. *Meigs' R.*, 22; 5 *Hum.*, 108. The verbal sale and delivery vested the defendants with a good title. *Tatum v. Jameson*, 2 *Hum.*, 298. Though no actual manual delivery of the chattel was made by the plaintiff to the defendants, yet the words of the plaintiff were equivalent thereto. He told the defendant where the property was, and authorized him to go and get it, whenever he chose to do so. From that moment, in contemplation of law, the property was in the constructive possession of the defendant, which was soon reduced to actual manual possession, in pursuance of the terms of his bargain. The plaintiff at no time denied or ignored the existence of his contract. He did not do so before he began his litigation. His bill of exceptions discloses no repudiation of it, as insisted by him, other than such as is imported by his refusal of the defendant's tender, after he had found he had made a bad bargain. Nor does the law permit a party thus

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to adjust and adjudicate the rights of his neighbor, growing out of a deliberate bargain of his own with that neighbor. It has been said that "good faith is the exchequer of princes: the more it is drawn upon, the stronger it becomes."

The law, which is, at last, but the interpretation of natural justice, had rather exact the utmost farthing in an extremely hard case, based upon deliberate contract, than invoke the prevalence of public and private dishonesty, by relieving a party of his solemn engagements, because he had made a bad bargain.

Under this contract the title to the property was absolutely vested in defendant; nor does the statement of the agent of the plaintiff, that when the defendant demanded the property he declined to surrender it, because he had no authority to do so, negative the plaintiff's continued acquiescence in the trade until the result of the siege of Knoxville had disclosed or foreshadowed the failure of his speculation, if, indeed, such a negative could have affected the rights of the defendant at all. The title being thus vested in the defendant, the Court is of opinion that the actions of replevin or detinue will not lie for the recovery of the property, nor the action of trover for its conversion. In this view of the case, the question whether the contract was void or voidable upon the ground assumed in argument, is an abstract question the Court does not undertake to determine; nor is the Court now called upon to pronounce upon the plaintiff's right to recover the value of the property in a proper form of action.

Let the judgment be affirmed.

Enoch Marshall v. William E. Dodson.

ENOCH MARSHALL, in error, v. WILLIAM E. DODSON.

1. COLLATERAL SECURITY. *Confederate Treasury notes.* Where a debtor transferred a note payable in Confederate Treasury notes, to be credited, if paid, otherwise he to stand bound for the original debt, held that the contract was not affected by the Confederate consideration of the note, and was not a contract to pay in Confederate notes.
2. CHARGE OF COURT. *On facts.* A charge that such a contract is a contract to pay in Confederate money, is a charge on the facts, and is erroneous.

FROM JEFFERSON.

Appeal in error from the Circuit Court of Jefferson County, W. L. ADAMS, J., presiding.

BARTON & McFARLAND, for defendant.

NICHOLSON, C. J., delivered the opinion of the Court.

On the 2d of December, 1862, Marshall sold to Dodson, a slave, for \$1,025, and received all the price except \$190, in payment of which balance, Dodson delivered and assigned to Marshall a note for \$190, on one Creed, payable on its face in Confederate money. The agreement between the parties was, that Marshall took the note on Creed, on this condition: "If the said Creed paid the note, then it was to be taken as a payment; otherwise Dodson was to stand bound to Marshall for the sum of one hundred and ninety dollars, the balance of the price of the negro." Marshall and Dodson went

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together to the house of Creed, who was then out of the country, and applied to his wife, who offered to pay the note in corn, which was refused by Marshall.

.. This action was then brought in the Circuit Court of Jefferson County, by Marshall, to recover of Dodson the balance of the price of the slave. Upon the trial of the cause, the Circuit Judge charged the jury as follows: "The plaintiff sues the defendant for \$190, the balance of the price of a negro sold by plaintiff to defendant, and at the time, the defendant delivered to the plaintiff a note of hand on one Creed, for the sum of \$190, payable upon its face, in Confederate money, as the last and full amount of the purchase price for said negro, and undertook and bound himself, if the same was not paid by Creed, the same would be paid by defendant. The Court instructs you, gentlemen, that the note signed and delivered to plaintiff on Creed, by defendant, being for Confederate money, created no liability on Creed to pay the same, nor would the plaintiff be entitled to recover off of the defendant, upon his promise to pay the same, if Creed did not. Because his agreement to pay the same, if Creed did not, was a promise to pay Confederate money, and nothing else."

The jury returned a verdict for the defendant; and upon the overruling of his motion for a new trial, the plaintiff appealed in error to this Court.

The charge of the Circuit Judge is palpably erroneous. He instructs the jury that the contract sued on, is a contract made by the defendant, to pay the note if Creed did not pay it, and was, therefore, a promise on the part of the defendant to pay Confederate money.

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In so charging, the Circuit Judge invaded the province of the jury, and withdrew from them their right to determine the facts in evidence.

He not only assumes to determine the facts, but his conclusion as to what was proven by the facts, is entirely erroneous. The proof was explicit, that if Creed failed to pay the note, defendant was to stand bound, not to pay the note, as assumed by the Judge, but bound to pay to plaintiff the sum of \$190, the balance of the price of the slave. It was the right of the jury to draw their conclusions from the facts; and not having been allowed to do so, by the instructions of the Judge, the judgment will be reversed, and the cause remanded for another trial.

WILLIAM ROLLINGS, Plaintiff in error, v. JOSHUA CATE

1. CONFEDERATE TREASURY NOTES. *Proof to support verdict.* Proof that a payor of a note, with a friend, met the payee in the road; payee told him they had come to pay the note; payor went to his son's house and returned, they awaiting his return; went to his house; payee said, you have come to pay that note; went into another room to get it; counted interest, and took pay in Confederate notes, and delivered note; enquired if they knew who would borrow the money; put it away in another room, and coming out, said he would keep an account of the men who paid him in that kind of money; the payee and friend being unarmed and using no threats or force, but being rebels, and the payee being Union, and being within the Confederate lines, and "there being a general state of fear in regard to refusing to take Confederate money,

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many Union men having been arrested." Held insufficient to prove duress, or to support a verdict.

2. DURESS. *Charge of Court.* Charge on foregoing facts that, "if through a present exciting fear, a person was forced" to take Confederate money, the payment would not be binding, without anything in charge, defining what result, feared, would suffice, is error.

EVIDENCE. Proof of a *general state* of fear, &c., as above, is inadmissible.

Case cited, *McSween v. Miller*, MS., Knox., 1867. See note p. 104.

 FROM JEFFERSON.

Appeal in error from the Circuit Court of Jefferson county. J. P. SWANN, J., presiding.

GRATZ, for plaintiff in error.

THORNBURG and MCFARLAND, for defendants, cited *McSween, v. Miller* MS. See note p. 104; *Blair v. Coffman*, 2 Tenn., 576; *Jones v. Thomas*, 5 Cold., 465.

NELSON, J., delivered the opinion of the Court.

This suit was brought before a Justice, by the defendant in error, against William Rollings, John Lyle, and Wiley Jones, who were required, in the warrant, to answer Joshua Cate, "in a plea of debt due by note, the note wrongfully in the possession of the said William Rollings, for five hundred dollars." Judgment was rendered in favor of the defendants, by the Justice, and Cate appealed to the Circuit Court, where the suit seems to have been prosecuted against Rollings alone, and verdict and judgment were rendered against him for two hundred and ninety-six dollars and sixty-

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six cents and costs, from which, having failed to obtain a new trial, he prosecutes this appeal in the nature of a writ of error. It seems from the proof, that Cate held a note on Rollings, who sometime in the year 1863 applied to Gass, to go with him to Cate, to see the note paid, stating that he had Confederate money, which he desired to use in the payment of his debts; that he had to take it, and would be ruined if he could not get to pay his debts with it. Gass, fearing that Cate would "get mad," refused to go, but told Rollings to meet him at Cate's mill on a certain day; that they met there at the time appointed, but Cate being absent, went to his house, and finally found him in the road; that Rollings told Cate he had come to pay that note; that Cate said he had to go by his son's house; that Gass and Rollings waited in the road until his return, and that the three then went to Cate's house; when Cate said, "you have come to pay that note," and went into another room and got it; that Gass counted the interest and Rollings paid the note in Confederate money; that Cate handed the note over to Rollings, took the money, and, as he went to put it away, inquired whether they knew of any one who wanted to borrow the money, saying he had no use for it, and that the answer was they did not. Cate then took the money, went into another room, and put it away, saying, when he returned, that he would keep an account of men who paid him their debts in that kind of money. Gass and Rollings were unarmed at the time of these transactions, and used no force, threat or violent language, to compel Cate to take the money, but it was in proof that Gass

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sympathized with the rebellion; that Cate was a Union man; that two of his son's were arrested by the rebels in the latter part of 1861, and released early in 1862; and that, when the note was paid, "there was a general state of fear among Union men in regard to disobeying the rebel rule, or refusing to take their money, and many Union men had been arrested." The defendant objected to the admission of the testimony last quoted, but his objection was overruled, and it was allowed to go to the jury, and to this action of the Court he excepted. It was proved that shortly before the note was paid by Rollings, one Elder paid Confederate money to him, and that Rollings said he was willing to take it, as he could use it as well, or better, than any other money in the payment of his debts. Elder, as a witness, stated that Confederate money was not received in payment of debts, as other money; and another witness testified that, after the money was paid by Rollings, he, the witness, borrowed some Confederate money from Cate, or one of his sons. This is the substance of the evidence as set out in the bill of exceptions.

Upon the question of duress, his Honor, the Circuit Judge, charged the jury as follows:

"The plaintiff alleges that he was forced against his will, to take Confederate money, through fear of personal violence. The rule of law is, that if, through present exciting fear, a person was forced to take in payment of a debt, Confederate money, such payment would not be binding upon him, and the debt would remain unsatisfied, and he would be entitled to recover the same, with interest; but if he received Confederate money without

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objection, or without force, or present fear of danger, such reception would be a valid payment, and the courts of the country would not disturb such executed contracts. Then look to the proof, and see if the plaintiff, under an exciting state of fear, took the Confederate money contrary to his will; if so, he would be entitled to a verdict; if not, the defendant would be entitled to a verdict."

Assuming that the evidence objected to was properly admitted, and that the instructions of the Court were perfectly correct, it is difficult to perceive on what ground the jury based their verdict; for, although a general fear may have existed among Union men, as to the hazard of refusing to receive Confederate money, it does not appear that the defendant in error was one of the persons thus actually afraid. So far from it, he seems to have acted with much coolness and deliberation; for after he was informed, in the road, that Rollings desired to pay the note, he went to his son's house; returned to the place where Gass and Rollings were waiting; went with them to his own house; deliberately passed into another room to obtain the note; brought it out, and received the money without the slightest objection; and, so far from exhibiting any trepidation or alarm, coolly walked into another room and returned, and then fearlessly stated that he would keep an account of men who paid him their debts in that kind of money. No threats were used; no arms were present; and the defendant carefully inquired whether any one desired to borrow the money he had received, and actually

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loaned Confederate money, afterwards, to one of the witnesses. It is well known that the Confederate Government used every means to keep its Treasury notes in circulation, to enable it to prosecute the war, and that some of its military commanders announced, in general orders, that it would be a grave political offense not to receive it; but these orders embraced all the citizens without distinction; and we cannot perceive, as a legal question, how the fear of offending the government, which may have been common to all the citizens, can be imputed as duress, in private transactions, where no threats or force were employed.

To hold that every citizen who passed, or received Confederate Treasury notes, under some general or indefinite apprehension that his failure to recognize the currency, would give offense to the Government, or any of its officers, acted under duress, and that his action can now be repudiated and disowned, would open the flood-gates of litigation, and unsettle all dealings and transactions in this State, in which that currency was employed. It would disturb the repose of society, shake the titles to property, and produce evil results, immeasurable and incalculable. Nothing short of duress, in its legal sense, can invalidate executed contracts. Under the law, as it formerly existed, it was necessary in order to constitute duress, that there should be some threatening of life or member, or of imprisonment, or beating of the party acting, or his wife, with a view to procure the execution of the deed, or other instrument, and the danger, existing or threatend, was re-

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quired to be personal, and danger to goods or property, was not sufficient to avoid the deed. *Shep. Touch.*, 28 *Law Lib.*, 61, m.; 1 *Black Com.*, 131, m.; 4 *Ib.*, 30, m. Under the law, as more recently declared, duress of the property, as well as of the person, is held to be sufficient. *Waller v. Parker*, 5 *Cold.*, 476. *Story on Contr.*, 4 *Ed.*, § 398. It was formerly held that, if the duress was by a stranger, and the obligor was not a party thereto, the agreement could not be avoided. *Ibid.*, § 400.

But we are not aware of any case in which it has been held, that, if a party act under "a present exciting fear," or an "exciting fear," without showing whether the fear was of danger to life, limb or property, the act can be legally avoided; and we hold that his Honor's instructions were erroneous, in not defining more accurately the nature of the fear. These instructions are the more objectionable when taken in connection with the fact that evidence admitted as to the "general state of fear, existing among Union men in regard to disobeying the rebel rule, or refusing to take their money." This was a species of hearsay testimony, not recognized by the rules of the law, and could have no legitimate application to the simple payment of a note by the plaintiff in error, to the defendant, without threats or coercion of any kind. Considered in the light of his Honor's charge, the jury might well infer, that, because Union men generally disliked Confederate money, such dislike and duress were convertible terms. The unreported case of *Mc-*

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Sween v. Miller,* does not, in our view, sustain his Honor's charge, or his action in receiving illegal testimony.

Reverse the judgment and remand the cause.

ANANIAS CLEVINGER, Adm'r of A. CLEVINGER, dec'd,
v. ALLEN CLEVINGER *et al.*

CONFEDERATE TREASURY NOTES. *Payment to Clerk in. When good by estoppel.* Where the administrator and distributees interested in a Chancery sale made in 1861, were all present at the sale, and one of

*The opinion referred to is as follows:

Supreme Court, Knoxville, September Term, 1867.

WILLIAM MCSWEEN, in error, v. C. M. MILLER.

HAWKINS, J., delivered the opinion of the Court.

There is no evidence to sustain the verdict; and as applicable to the facts of this case, the charge of the Court was erroneous, and tended to mislead the jury. The rule is, where a threat of unlawful mischief or injury to the person, property or good name of a party, is of sufficient importance to destroy his free agency, the law, because of such duress, will not enforce any contract which he may be induced by such threats to make. The controlling question is, was the threat of such a character, as, under the circumstance surrounding the parties at the time, was sufficient to overcome the mind and will, or in other words, to destroy the free agency of a person of ordinary firmness; and his free agency being thus destroyed, was he thereby induced to give his assent to the contract? If so, the contract can have no validity whatever, because it is wanting in the essential elements of a valid binding contract, to-wit: the free and voluntary assent of the minds of the parties making it.

Judgment reversed, and cause remanded for a new trial.

NOTE.—See also, *Jones v. Thomas*, 5 Cold., 465. And see *Hammons v. Bcg'le*, Nashv., 1870; *Stroud v. Falkner*, *Ibid.*, where duress was held to exist.—REPORTER.

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them joined the commissioners in the declaration that when the notes fell due, they would take whatever might be the currency in use, and the others made no objection, and the Clerk, by direction of the administrator, took Confederate bonds and notes, it was held that the Clerk could not be made personally liable for the loss.

FROM COCKE.

From the Chancery Court at Newport. The record does not show what Chancellor was presiding when the decree appealed from was passed.

BARTON and MCFARLAND, for complainants.

DEADERICK, J., delivered the opinion of the Court.

The bill in this case was filed in the Chancery Court at Newport, to partition land and distribute the personal estate, after the payment of debts, amongst the heirs at law and distributees of Clevenger, deceased.

It was found impracticable to divide the slaves, and they were directed, by decree at March Term, 1861, to be sold on a credit of twelve months.

The sale was accordingly made, and most of the slaves were purchased by the distributees.

One was bought by John Rorax, at the price of \$1,100, one by Wm. Vinsent for \$1,005, and one by James C. Murray, for \$889.

But the only question we are called upon to decide is, whether W. McSween, former Clerk and Master of said Court, who made the sale of the slaves, is liable to account for the price of the slave sold to Rorax.

The facts in relation to that transaction are, that at the time the sale was made, McSween and the adminis-

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trator, who is also one of the distributees, announced, that when the notes fell due, they would receive payment in whatever was the currency then in use. It is also in proof that bank notes and Confederate notes were current at the time the notes fell due.

Three witnesses were examined, two of whom concur in stating that some of the other distributees were present, and one states that all were present when this announcement was made, and none of them made any objection.

It is also shown by the proof, that when his note fell due Rorax was applied to by the administrator to pay it, and was directed by him to procure a \$1,000 Confederate bond, and pay to McSween, and that he did procure the bond, and paid it on his note, and the balance he paid in Confederate notes.

The Chancellor decreed that McSween should be charged with the amount received of Rorax, less the share, one-twelfth, belonging to the administrator, who is one of the distributees.

In this we think there is error. It is not pretended that the Clerk and Master has acted in bad faith in receiving the Confederate notes, in payment of the debt due from Rorax. On the contrary, it is fully shown by the testimony of Rorax, that the \$1,000 Confederate bond was paid to McSween at the special request, and by the direction of the administrator, and that McSween, in receiving said bond at the request of said administrator, and in view of the announcement made at the time of the sale of the slaves, which was concurred in by all parties in interest, incurred no personal liability for

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the loss of the same. The administrator has a right to receive the assets of the estate, for the purpose of paying debts, and to receive payment of debts due the estate. And, we hold that it would be unjust to McSween, under the peculiar circumstances of this case, to charge him with the loss of the \$1,000 bond, when it is apparent he was acting in accordance with the wishes and implied instructions of those who are now seeking to hold him liable for a loss which should properly fall on themselves.

The decree of the Chancellor will be modified to the extent, and in the particular, indicated in this opinion, and in all other respects be affirmed with costs.

A. W. TORBETT v. J. H. and GEORGE WORTHY.

1. CONFEDERATE TREASURY NOTES. *Renewal.* Notes being given in consideration of Confederate Treasury notes, were indorsed *with recourse*; the assignee surrendered the notes, and the maker executed a new note. Held, that if the want or character of consideration affected the original notes, the defense was waived by executing a new note, without notice to the payee of the facts.
2. INDORSEMENT. *With recourse.* That the surrender of the notes, and the consequent release, of the liability of the assignor implied from the words, *with recourse*, was a valid and sufficient consideration for the new note.

FROM MONROE.

From the Circuit Court of Monroe County. E. T.
HALL, J., presiding.

A. W. Torbett v. J. H. and George Worthy.

W. J. HICKS, for plaintiff, insisted:

That if the original contract was illegal, the defendant was in *pari delicto* with the payee, and entitled to no favor—citing, *Holman v. Johnson*, Cowp. R., 343; *Parks v. McKamy*, 3 Head., 298; *Thornburg v. Harris*, 3 Cold., 157; *Petrie v. Hannay*, 3 T. R., 422; *Browning v. Morris*, Cowp. R., 792; that the plaintiff was in no fault.

That plaintiff stands in the position of an innocent purchaser; having taken the note in renewal, parted with his guaranty—citing, *Nichol v. Bate*, 10 Yerg., 434; *Haley v. Long*, Peck, 93.

That the original notes purport to be for money collected, and they cannot be contradicted by parol evidence,

TURNEY, J., delivered the opinion of the Court.

The charge of his Honor, the Circuit Judge, is erroneous. The suit was commenced before a Justice of the Peace, on the following note:

“\$163.76.

“One day after date, we promise to pay A. W. Torbett one hundred and sixty-three dollars and seventy-six cents, for value received. May 9th, 1865.

(Signed,)

“J. H. WORTHY,
“GEO. WORTHY.”

There was an appeal from the judgment of the Justice to the Circuit Court, where there was verdict and judgment for the defendants, and an appeal to this Court. The defendants proved that about the time the note bears date, A. T. Hicks calculated the interest on the following two notes, viz:

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“Due W. W. Lillard, ninety-three dollars and thirty-eight cents, for value received. Sept. 26, 1862; money collected for him.

(Signed,)

“JAMES H. WORTHY.”

ENDORSED.—“Received on the within note, sixteen dollars and thirty-four cents. Nov. 27, 1862. \$16.34.

“With recourse, for value received, to A. W. Torbett, January 1, 1863. W. W. LILLARD.”

SECOND NOTE.—“Due W. W. Lillard, seventy-two dollars and eighty-nine cents, for money collected for him, Sept. 27, 1862.

(Signed,)

“J. W. WORTHY.”

ENDORSED.—“With recourse, for value received, I assign the within to A. W. Torbett. January 2, 1863.

“W. W. LILLARD.”

Defendants also proved that the consideration of the last two notes was Confederate money; that defendant, J. H. Worthy, had executed to the plaintiff the note sued on, with defendant, George Worthy, as security in renewal of the two last described notes, which had been assigned by Lillard to plaintiff.

The Court charged the jury, “that if the jury should find from the testimony in this cause, that the consideration of one or of the both notes executed to Lillard, produced and read by the defendant on the trial in this cause, was Confederate Treasury notes, and that they were transferred to the plaintiff after due, that they would be subject to the same defenses in the plaintiff’s hands as they would have been subject to in the hands of Lillard, to whom they were executed; and that if the jury should find that these notes were renewed by the

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defendants, and the consideration of either or both of them was Confederate Treasury notes, and they were included in the note sued on in this action—in that event, no recovery could be had in favor of the plaintiff, and the jury should find for the defendants.”

This was error. The indorsements upon the notes show them to have gone into the hands of the plaintiff, for a valuable consideration to the assignor.

If the consideration of Confederate money was a defense of which the maker might have availed himself as against the payee, and as against the assignee taking the notes over-due, the defendants waived that defense by the execution of the note sued on, without claiming the defense, or bringing it to the knowledge of the plaintiff. Besides, the assignor had assigned the original notes with recourse, and for value, thereby, although inartificially expressing it, making himself liable to the assignee.

By executing the new note with security for the two original notes, the plaintiff was induced to and did surrender the guarantee of Lillard; this, of itself, was a sufficient consideration for the note sued on.

Judgment reversed, and cause remanded.

Jacob Naff v. John Crawford.

JACOB NAFF v. JOHN CRAWFORD.

1. CONFEDERATE TREASURY NOTES. *Consideration.* Confederate Treasury notes possessed during the existence of the "Confederate States," such elements of value as rendered the loan of them a valuable consideration, which would support a contract.
2. SAME. *Contract to pay not illegal.* A contract made in the ordinary course of business, within the territory of the Confederate States, and not with any express view to give aid to the Confederates, will not be held unlawful, for the reason only that it is payable in Confederate Treasury notes.
3. SAME. *Note in renewal of note to pay.* A note for current bank notes, given in lieu of a previously existing note, to pay the same amount in Confederate currency, which was executed in consideration of a loan of Confederate money, is not invalid by reason of the consideration on which it is founded.

FROM GREENE.

From the Chancery Court at Greeneville, S. J. W. LUCKY, Ch., presiding.

F. A. REFVE, for complainant.

S. T. LOGAN, for respondent.

FREEMAN, J., delivered the opinion of the Court.

This is a bill filed in the Chancery Court at Greeneville, to enjoin a suit pending before a Justice of the Peace for Greene county.

The bill alleges that, in 1863 complainant borrowed of the respondent, John Crawford, three hundred dollars in Confederate money, in said county of Greene, and

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gave his note for the same, and that his impression is that said note calls for either "Confederate money" or "Current bank notes;" that a suit had been commenced on this note sometime after it was given, (before a Justice of the Peace,) and soon after the resumption of the authority of the United States Government in East Tennessee; that the defendant, by means of threats and duress, induced him to give a new note, against his will, payable in current bank notes, in lieu of the first one given; which last note is the one sued on before the Justice of the Peace, the collection of which is sought to be enjoined by this bill.

The bill contains much of mere verbiage and immaterial matter; the above, however, is the substance of its allegations, on which the question is raised on which we rest our decision.

The answer of Crawford admits that the complainant did borrow three hundred dollars from him in 1863, but says he does not remember whether it was in Confederate money or current bank notes, and that complainant gave his note for the same, payable in current bank notes. He admits that about the time General Burnside took possession of East Tennessee, a suit was brought on this note, but denies expressly that on the day set for hearing, or at any other time, he induced complainant by threats or duress, to settle the matter by giving a new note, but states that the giving of the new note was proposed by Naff, freely and voluntarily, and accepted by him as a compromise.

The proof shows clearly that the first note was given for \$300 in Confederate money borrowed of Crawford

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by complainant. It also shows clearly that the note he seeks to enjoin in this case was given in consideration of, or in lieu of, the first note given, and in further consideration that Crawford would dismiss the suit he had commenced before the Justice of the Peace.

It may be that the validity of this note might be sustained on the principles laid down by Parsons on Contracts, vol. I. p. 439: "That the giving up a suit or any equivalent proceedings instituted to try a question of which the legal result is doubtful, is a good consideration for a promise to pay a sum of money for an abandonment thereof." But as the question of the validity of a contract, where Confederate notes is its consideration, or the illegality of such contract, in the ordinary transactions of the country, during the late war, within the Confederate States, is fairly presented in this case, we conceive it to be the duty of the Court, to meet the question, and announce what we hold to be the law in such cases. We therefore proceed to the investigation of the question, on principle and authority, and give our conclusions.

The question of Confederate money as the consideration of a contract, was brought before our immediate predecessors, in the case of *Wright & Cantrell v. Overall*, 2 Cold., 336. In that case, a receipt had been given by Overall for \$300, as part payment on a note, and the face of the receipt showed that it was to be entered as a credit on the note sued on in the case.

The Circuit Judge charged the jury that this receipt was an undertaking on the part of Overall, to see that the credit was placed upon the note; "that the undertaking was executory and must be supported by a good

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or valuable consideration; and that 'Confederate money,' having been issued against the public policy, and without authority of law, was neither a good or valuable consideration."

Judge Milligan, in stating the question to be decided in the case, says, "the whole question turns upon the validity of 'Confederate money,'" and we are not at liberty to evade it. Was the "Confederate States" such a sovereign and independent or political corporation or organization as authorized it to coin money or issue its bonds or notes on the faith and credit of the organization, and bind the people of the "so-called Confederate States for the payment thereof? This is the question with which we have to deal, and however much the business transactions of this State may be involved in it, we have but one duty to perform, and that is to tread the path marked out by the law."

The learned Judge then goes on to discuss the question, arguing that the "Confederate States were never recognized as a Government by the departments of the Federal Government to which this right of recognition belonged, and that until such recognition of the existence of the new government, the courts could not do so." He then concludes that the payment, as evidenced by the receipt, having been made in "Confederate money," was utterly void. The paper itself having been issued against public policy—for an unlawful and illegal purpose, and without any authority of law, of which the Court can take cognizance—must not be held as worthless bank paper, issued by a legally constituted corporation, but as paper issued without any legal authority whatever, and,

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therefore, worthless in the payment for property or pre-existing debts." In the case of *Thornburg v. Harris*, 3 Cold., 158, the same line of argument is presented in the opinion of the Court, by Judge Shackelford, and the question considered and discussed in an elaborate opinion. The conclusion of the Court is thus stated: "The consideration of this note being Confederate Treasury notes, issued in violation of the highest law of the land, and for the purpose of levying war against the Government, is illegal and void." He then adds: "No Court will lend its aid to enforce a contract which is founded on an immoral or illegal act," citing numerous authorities in support of this last proposition.

We have thus given the views of our predecessors, in their own language, on this question, that we may fairly test their soundness, or rather the correctness of their application, on this somewhat interesting, though not now, very practical question; inasmuch as the larger portion of the cases in which it was involved have passed away and been already settled.

It is not questioned that all contracts in violation of morality, and founded on considerations against good morals, are void; that no agreement to do acts forbidden by the law of God, or which are manifestly in furtherance of immorality, and tend to contaminate the public mind, can be tolerated or can be enforced by the common law. 1 Story on Contr., § 541. In illustration of this rule, Mr. Story says: "So, also, a lease of lodgings, for the purposes of prostitution, is void. But the mere fact that the person to whom the board or lodging or any articles are furnished, is a prostitute, does not in-

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validate the contract therefor, unless the very object of the agreement be to pander to her prostitution. Vol. 1, § 542. The same principle, precisely, applies to contracts which violate public policy; that is, that all agreements which contravene the public policy are void, whether they be in violation of law or morals.

The illustrations given of cases in which these principles are applied, or out of which they have grown, are cases of contract in restraint of marriage, marriage brokerage contracts, wagers and gaming contracts; contracts to offend against the law and public duty; usury, and trading with an enemy.

We have given this enumeration in connection with the statement of the rule, in order that we may see clearly what is meant by a contract, immoral, illegal, or in violation of public policy, or founded on an illegal or immoral consideration, and which can not be enforced. We lay down the rule as deduced from these illustrations, to be, that the *agreement* must be to do or further some illegal or immoral purpose, or some purpose in violation of public policy.

The element that destroys the validity of the agreement is the purpose, by the agreement, to effect or aid the forbidden end, or else the consideration for the promise must have been to do or perform an illegal or immoral act. If this were not the rule, then a contract might be declared void, as against public policy or public law, that did not stipulate for any violation of the one or the other. Take the case of a contract in restraint of marriage, which is held void. What does such a contract stipulate for? That the one party, for

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a consideration, *agrees* that he or she will not marry at all. Marriage being encouraged by the policy of the law, a contract to prevent it is in violation of this policy, and is void.

We need not look further in this direction to ascertain the application and limitations of these well-settled principles. We will, for a moment, look at some of the cases in which the principle has been stated and applied, in the courts of the United States and of our sister States, that we may see whether the loan of Confederate money, or a note given for Confederate money, or a promise to pay Confederate money, within the Confederate lines, during the late war, was in violation of these well-settled principles of law, or whether the cases in 2 and 3 Cold., are not entire misapplications of the principle.

We regret that we have not had access to a larger number of cases on the question, as we feel sure that, on careful examination, they will all be found to sustain the view we have taken. In the case of *Random v. Toby*, 11 Howard (U. S.) R., 698, Curtis' Ed., the notes sued on had been given for African negroes, imported into Texas. It was insisted that the introduction of African negroes, both into the Island of Cuba and State of Texas, was contrary to law, the negroes having been carried from Cuba to that State. The Court said, on this question, that it was not a defense to the notes, either on the ground of want of consideration, or that the contract was in violation of law, and so void. "If," says the Court, "these notes had been given on a contract to do a thing forbidden by law, undoubtedly they

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would be void; and the Court would give no remedy to the offending party, though both were *in pari delicto*. But Toby, (the payee of the notes,) or his agent, McKinney, had no connection with the person who introduced the negroes contrary to law. Neither of the parties in this case had anything to do with the original contract, nor was their contract in violation of law. The crime committed by those who introduced the negroes into the country does not attach to all those who may afterwards purchase them." And so we say, that, admitting the Treasury notes to have been issued originally in violation of public policy, without any authority of law, still, the wrong of the parties issuing them does not attach to those who may afterwards, without any connection with, or furtherance of the original design, purchase or circulate such notes.

The Court further says, in the above case: "If defendant should be sued for his tailor's bill, and come into Court with the clothes made for him, on his back, and plead that he was not bound to pay for them, because the importer had smuggled the cloth, he would present a case of equal merits, and parallel with the present; but not likely to have the verdict of the jury, or judgment of the Court in his favor." In another case, goods were sold to a man who intended to smuggle them and defraud the revenue, and the vendor knew of the design—it was held that the contract was valid, and the vendor could recover the price; *Helman v. Johnson*, Cowp. R., 341. But where goods were sold to a man who intended to smuggle them, and defraud the revenue, and vendor not only *knew* of the purpose, but put

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them up in a particular manner, so as to enable it to be done; it was held that the contract was void, and the price could not be recovered; *Briggs v. Lawrence*, 3 Term. R., 454. "If the illegal use to be made of the goods, say the Supreme Court of Massachusetts, enters into the contract, and forms the motive and inducement, in the mind of the vendor or lender, to the sale or loan, then he can not recover, provided the goods or money are actually used to carry out the design—but bare knowledge on the part of the vendor, that the vendee intends to put the goods or money to an illegal use, will not vitiate the sale or loan, and deprive the vendor of all remedy for the purchase money; *Doter v. Earl*, 3 Gray, (Mass. R.,) 482. See also, *Hedges v. Wallace*, 2 Bush., (Ky. R.,) 442; and we add that with much more reason it may be held, that a simple knowledge of the fact that an article was manufactured, or originally designed for an illegal or immoral purpose, will not vitiate or contaminate a subsequent contract for its use, in any way neither illegal or immoral, as in the cases of loan or ordinary use of Confederate money, in the States engaged in the rebellion during the late civil war.

The above cases serve well to present the true principle, that is: there must be a participation in the illegal purpose by the parties to the contract; the agreement must be in aid of, or furtherance of the illegal end.*

If this be the sound principle, then how can it be held, that the loan by one party, and the borrowing by another, of Confederate treasury notes, was in any way connected with the original wrong of their issuance, if

*See *Tedder v. Odum*, Nashv., 1870.

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any there were, or that such loan was intended either to further or aid in such issuance, or to aid in the rebellion in which the Confederate States were then engaged. We confess we are totally unable to see any wrong, either public or private, intended by such a transaction; certainly none entered into the minds of the parties at the time, in this case.

We are unable to see how, in fact, the parties in this, and all like cases, can be said to have aided in, or been guilty of, the moral or legal wrong involved in the issuance of these notes, as the wrong had already been done, the purpose attained so far as the notes loaned are concerned, and the amount of such issues was neither increased or diminished by the circulation of the notes, or by the refusal of one party to borrow and the other to loan.

It is insisted, however, that the value of Confederate notes, might have been increased by their circulation, and the parties aided in this circulation by their contract. So it may equally well be said, that the value of the imported negroes depended on their importer being able to sell them, and their purchase by parties encouraged their importation.

If the argument is sound, that all acts or courses of action, that indirectly tended to aid and strengthen the military power of the Confederate Government were unlawful, and in violation of public policy, whether done with the purpose or intent so to aid and strengthen this military power, or not, then we ask of what offense were such parties guilty, and by what law is their punishment defined? For instance, the growing of corn, and of wheat, the production of meat, the manufacture

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of cloths of any kind at home, and in fact, all the energetic industries that were wakened into life during the great civil strife, tended directly to strengthen the military power of the Confederate Government, either by supplying its armies with the necessaries thus produced, or by keeping up the heart of the people engaged in the struggle, by meeting these essential needs, the supply of food and raiment. May we not well suspect the soundness of the argument that involves the proposition, that all the industries of the land, during the late war, without which, millions would have perished, were wrong and illegal, and in violation of public policy, as tending directly or indirectly to aid the rebellion, whether so intended or not. We need not pursue this branch of argument further. In support of this view of the question, we refer to the case of *Phillips v. Hooker*, decided by the Supreme Court of North Carolina; Am. L. Reg., vol. 7, p. 40.

We might cite numerous decisions of several of our sister States, that hold as we have done in this opinion.

We content ourselves, however, with only a few cases, which abundantly sustain the views herein maintained.

The Supreme Court of Kentucky, in the case of *Martin v. Horton*, et al., 1 Bush., 629, decided in the winter of 1865, Judge Williams delivering the opinion of the Court, "that the circulation of 'Confederate currency,' within the Federal lines, and jurisdiction of the United States, was forbidden by the laws and public policy of the United States; and also, that the circulation of the United States treasury notes was likewise

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forbidden, within the military lines and jurisdiction of the 'Confederate States,' as against their public policy and laws." The Court then goes on to say, the currency that was recognized by the laws and military authorities of the Confederate States as money, and its circulation encouraged by its policy, and which did so circulate within its lines and jurisdiction, must be regarded as a valuable and not a vicious or illegal consideration, especially when voluntarily received and used. To permit its reception and use, and then to escape from the obligation, by a party, would be to recognize a system of legalized robbery, which would be equally or more odious to the sensitive justice of the law." See also, *Rhodes v. Patillo*, 5 Bush. Ky. R., 272; *Miller v. Gould*, 38 Georgia R., cited in Am. L. Reg. for 1869, p. 310.

We need not refer to the late case of *Thorington v. Smith*, decided by the Supreme Court of the United States, found in 8 Wallace Rep., p. 1, and reaffirmed and explained by Chief Justice Chase, in the case of *Head et als v. Talley*, Adm'r, reported in Am. Law Times, Sep. 1870, 157, as holding the views held in this opinion, and maintaining them by what we deem unanswerable reasoning. The Court says, in 8 Wallace, p. 11, and after referring to the character of the Confederate Government and its actual "supremacy," as a fact, over its territory during the war; and citing the case of the *United States v. Rice*, with other cases, too familiar to the profession to be here referred to; that "it was by this Government exercising its powers throughout an immense territory, that the Confederate

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notes were issued early in the war, and these notes, in a short time, became almost exclusively the currency of the insurgent States. As contracts in themselves, except in the contingency of successful revolution, those notes were nullities; for except in that event, there could be no payor. They bore, indeed, this character upon their face, for they were made payable only after the ratification of a treaty of peace between the Confederate States and the United States of America. While the war lasted, however, they had a certain contingent value, and were used as money in nearly all the business transactions of many millions of people. They must be regarded, therefore, as a currency, imposed on the community by irresistible force."

The Court goes on to say, that, "contracts stipulating for payments, in this currency, can not be regarded, for that reason only, as made in aid of the domestic insurrection."

"They have no necessary relations to the hostile Government, whether invading or insurgent. They are transactions in the ordinary course of civil society, and though they may indirectly and remotely promote the ends of the unlawful Government, are without blame, except when proved to have been entered into with actual intent to further invasion or insurrection. We can not doubt that such contracts should be enforced in the Courts of the United States, after the restoration of peace, to the extent of their just obligations." This conclusion of that high tribunal, we adopt and approve, and hold that, if a note payable in Confederate money can be actively enforced, as held by the Supreme Court

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of the United States, that one given in consideration of such currency loaned, can, with equal, if not greater propriety, be held binding and valid, and enforced in our Courts.

This Court, in the case of *Wright and Cant ell v. Overall*, 2 Cold., 344-345, seem to rest upon the ground that there was no consideration for the promise of the party sought to be charged, because "Confederate Treasury notes" were not money, and were issued without lawful authority. The case is likened to a payment in counterfeit bills on a bank, which has always been held void, and they cite the principle as follows, from the case of *Ware v. Street & Co.*, 2 Head., 609. "A payment of genuine bank notes, supposed by both parties to be good, though, in fact, worthless, will be binding, and the loss must fall on the receiver, in the absence of a fraud. It is otherwise, if the notes be not genuine; not what they purport to be. So a payment in forged paper would be void, and have no effect as a credit or payment for property, or a pre-existing debt. "Much more," says the Judge delivering the opinion, in case, in 2 Cold., 345, "must the principle be applicable, when the notes purporting to be money, were issued against public policy, as well as the laws and Constitution of the United States, and expressly for their overthrow."

We admit the correctness of the principles cited above from 2 Head, but can not see how it supports the deductions drawn from it by the learned Judge. The Confederate notes were not counterfeits nor forged, but genuine, and precisely what they purported to be, the promi-

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ses to pay, at the time, and on conditions specified on their face, of the Confederate States Government. The party who took them as a loan, took them with the full knowledge what they were; and when he gave his note in consideration of such loan, knew precisely what he had borrowed, and that their future value depended upon the contingency of the result of the war then being waged, and so there was no fraud as to him. It would be more properly likened to the case of a man purchasing a genuine note on a man of doubtful solvency, where the purchaser knew all the facts, and took the chances of realizing the money on it. Certainly no one would contend that he would be exonerated from payment because the party whose note he had purchased proved totally unable to pay it, or even should he die and leave no assets to discharge his liability.

Did these Confederate Treasury notes then furnish that element necessary in every contract—a valuable consideration—at the time when this note was given?

Chief Justice Chase, in *Thorington v. Smith*, 8 Wall. R., says: “While the war lasted they had a contingent value, and were used as money in nearly all the business transactions of many millions of people.”

By the term consideration, is to be understood some cause which has a legal or appreciable value, and not merely a moral motive: 1 Story on Contr., §§ 427, 228; 429.

The value of an article is either intrinsic, by reason of its use in the affairs of mankind, or extrinsic or exchangeable value, because of the fact that it is an article of exchange, or may, by reason of some circumstance

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connected with it, be exchanged for other articles of intrinsic value. Gold and silver have both kinds of value, being a medium of exchange, and valuable as such, and also have an intrinsic value by reason of the fact of their usefulness in the manufacture of various articles, such as plate and other wares. It can make no kind of difference as to which kind of value may be attached to the article furnishing the consideration for a contract, so that it has a real value, either of the one or the other kind.

No one will contend that Confederate Treasury notes did not, during the war, possess an exchangeable value; as we all know that almost the entire expenses of a gigantic civil war were met by payments in this currency, for four years; and further, that almost all the money transactions, almost every purchase made by near twelve millions of people for four years, was made by means of these notes—from the purchase by the widow of the medicine for her sick child, or food and raiment for her family, up to the largest transactions that characterize the business of a wealthy, enterprising, intelligent and trading people.

This element of value we hold to have been a sufficient consideration to support a contract for the loan or payment of Confederate money.

We might add numerous authorities and reasons to what we have cited and said, in support of the conclusions to which we have come in this opinion; but we deem these sufficient.

We have gone at greater length than we desired into the reasons on which this opinion is based, feeling

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that it was due that we should vindicate our opinion in overruling decisions made by our predecessors, by the weight of well-recognized and well-considered authorities, and show that we have not done this on any mere theories of our own, but in accordance with the adjudication of the highest tribunals, both of the United States and England, and of text writers of established and recognized reputation—such adjudications and text writers as are cited, and deemed authoritative and conclusive as to what is the law of the land, in deciding all other questions that are presented for settlement in the courts of our country, involving the rights and liberties of the citizen, whether in person or property.

Believing, as we do, that our opinion is based on an overwhelming weight of authority; is in accord with the soundest legal analogies, and supported by the clear dictates of an enlightened reason; works no injustice to any one; will conserve and advance the ends of justice, and maintain the integrity of contracts, solemnly entered into between man and man while the opposite view gives the sanction of law to bad faith and dishonesty; we unhesitatingly announce the foregoing conclusions as containing the true rule for the settlement of the question herein discussed.

We hold that the Chancellor erred in his decree for complainant, in this case. We reverse his decree, dissolve the injunction, dismiss the bill; and order that the complainant and his sureties pay the costs in this Court and the Court below.

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1. **AUTHORITIES.** *Precedents in time of civil commotion.* Judgments of courts in times of great civil commotion, are of but little authority.
2. **SAME.** *When United States decisions controlling.* Where a question of general, rather than local interest, affecting many States, has been the subject of conflicting decisions, though properly governed by the same principles, the judgments of the Supreme Court of the United States are of high authority, and ought, in general, to be accepted and adopted by the States.
3. **CONFEDERATE TREASURY NOTES.** *Not illegal. Case approved.* The judgment in *Thorington v. Smith*, 9 Wal., 1, approved, holding that Confederate Treasury notes were issued and imposed on the community by irresistible force; that the use of them by parties who had no purpose, in such use, to further insurrection, was not unlawful.*
4. **GOVERNMENT DE FACTO.** *States resisting the United States.* The State governments, during the war against the United States, were *de facto* governments "in the highest degree."†
5. **ILLEGALITY.** *Knowledge of, without concurrence.* Mere knowledge of illegality, affecting the subject matter of a contract, does not taint the contract as illegal.
6. **STARE DECISIS.** *When not controlling.* The rule of *stare decisis* applies especially to rules of property, and decisions on the faith of which parties have acquired rights or made dealings. The Court is less reluctant to disturb a line of decisions, recently established, affecting, exclusively, rights fixed before the rulings were made, which do not affect sales of property, or rights acquired on the faith of such decisions. That the reversal gives to parties, whose rights have not been adjudicated, a different measure of justice from that previously administered to others in like cases, is not a serious objection to the reversal of such decisions.

FROM WASHINGTON.

Appeal from the decree of O. P. TEMPLE, Ch., in the Chancery Court at Jonesboro.

* See *Naff v. Crawford*, ante p. 111.

† See *Smith v. Brazelon*, ante p. 44.

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S. T. LOGAN, for complainant.

A. J. BROWN and J. G. DEADERICK, for defendants.

SHIELDS, S. J., delivered the opinion of the Court. DEADERICK, J., having been of counsel, did not sit in this cause.

The bill in this cause, charges that, on July 4, 1863, the complainant and Jacob Garst made to the defendant, David Argenbright, their note for seven hundred and seventy dollars, due at one day, and payable "in the currency of the country, when called for;" and that the said note was made in consideration of "Confederate Treasury notes." It is further charged that, on August 17, 1865, the said note was renewed by the complainant, together with one H. M. Rose, the new note being of the sum of eight hundred and sixty-six dollars and twenty-five cents, due at one day; that on September 7, 1865, the complainant conveyed to the defendant, Fain, *in trust*, certain real estate, in the bill described, with a power to sell, for the purpose of securing the payment of the last-mentioned note, and that the trustee, in pursuance of the said power, was about to sell the land.

It is assumed in the bill that the alleged consideration for which these notes were made, was of such a character as to vitiate them, and also the conveyance in trust, made to secure the payment of the note last made; and the prayer of the bill is, that said note, and the said deed in trust, be declared void, and that the

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defendants be enjoined from enforcing payment of the same by a sale, under the trust deed, or otherwise.

To this bill the defendants filed a demurrer, the ground of which seems to be, that the parties were *in pari delicto*, and that the Court should not interpose. The demurrer was overruled; and, in our view of the case, it is unnecessary to consider whether the order of the Court, in this particular, was correct or not.

The defendants answered, and substantially deny that the consideration on which the note was made, was "Confederate Treasury notes;" and much proof was taken on this controverted question of fact.

Upon the hearing of the cause in the Court below, the Chancellor held that the proof sustained the allegations of the bill; and in this, we think, his conclusion was correct.

But the Chancellor further held that the legal consequence of this fact—that the note was made in consideration of "Confederate Treasury notes"—was, that the said note, and the said deed in trust, were null and void, and that the complainant was entitled to the injunctive relief prayed for, and he decreed accordingly.

It clearly appears from the record, that the transaction out of which this controversy arises, had no connection whatever with the civil war that at the time was flagrant; that the use of the "Confederate Treasury notes" by these parties, as a circulating medium, was not for the purpose of giving them circulation, or sustaining their credit as money or the representative of value, with a view to aiding the power that issued them, in the pending

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struggle. The intentions and objects of the parties were innocent; the business in which they were engaged was not in contravention of law, public policy or sound morals; but finding in circulation a species of paper currency, freely passing from hand to hand, having a value in fact, and answering the demands and meeting the conveniences and the daily necessities of trade, and recognized as lawful money by their *State* Government—the circulation of which was then being enforced by said Government, and also by another and more general Government, then in existence, under the authority of which they were living—they used this paper currency, to their mutual advantage, subsistence, benefit and profit—the one party *actually* parting with, and the other party *actually* receiving, a certain available value, convertible into whatever was needed to sustain life and make it comfortable, or, if desired, into land or gold, for the purpose of a permanent and safe investment.

This is the whole case, upon the facts; and the question presented for our consideration is, was the conclusion of law drawn by the Chancellor, correct?

The question involved is not a new one in this Court. Soon after the close of the late war—so soon, that we may almost say, in the midst of arms—the cases of *Wright & Cantrell v. Overall*, 2 Cold., 336, and of *Thornburg v. Harris*, 3 Cold., 157, were decided. In these cases, and in several subsequent cases—*Hale v. Sharp*, 4 Cold., 275; *Fain v. Headerick*, 4 Cold., 327, among the number—it was held that contracts of this character were utterly null and void, because the said Treasury notes were issued by an unlawful and treason-

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able organization, to aid its treasonable purposes and designs; and because every individual, in passing and receiving them, gave aid and comfort to the enemies of the Government. 3 Cold., 163.

In other States, where these notes were put in circulation, and answered the purposes of trade and commerce, and where men, under the stress of the circumstances by which, "in the course of human events," they were surrounded, and in obedience to laws then and there being rigidly and irresistibly enforced, sold and became the owners of permanent and valuable property, in consideration of them, which they still hold and enjoy, a widely different view of the question has been taken; and those who borrowed, and in fact had received the value of them, were held to account for that value, whatever it was.

These latter decisions were also made soon after the close of the war, and have since been constantly adhered to as being sound in law and morals.

It may be true, as remarked by a very eminent Judge and jurist, in a late case in the Supreme Court of the United States, that the judgment of courts in times of great civil commotion, are of but little authority, on a reconsideration of the question, under circumstances less calculated to disturb and sway the course of thought and reason.

Be this as it may, the tribunals of last resort in these States, have differed, and established within their respective jurisdictions, a painful conflict of judicial rulings, the more distressing, because the question is one that greatly affects the interests of the people of

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many States, and may be considered as one of national interest and importance.

It is certainly to be desired, that the rule should be the same wherever its application is called for; that the same measure of justice should be meted to every citizen of the same general Government. Under our national organic law, this is always attainable, when the question is one that strictly arises under the Constitution and laws of the United States; and we hold, that, in a case like the one now before us, which involves a question directly affecting the citizens of so many of our States, that, although a ruling of the Supreme Court of the United States is not absolutely binding on the State Courts, yet, that it is entitled to the very highest respect, and with rare exceptions, should be accepted and adopted by them.

Entertaining these views, we, in the midst of these conflicting judgments, in the several States in the South, turn to the tribunal of last resort under the Constitution and laws of the United States, as an arbiter, the award of which we are disposed to follow, unless that award is so repugnant to authority, reason and principle, that our deliberate judgments, and dispassionate views of morality and law, forbid us to do so.

And that Court, having held, in the cases of *Thorington v. Smith*, and of *Dean v. Younell's Adm'r*, the one from Alabama, and the other from the State of Georgia, reported in 8 Wallace, p.p. 1 and 14, the decisions having been made some years after the close of the war; that in the absence of fraud, and where there was no intention to give currency to the notes in aid of the re-

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bellion, or to otherwise aid the rebellion; and the contract was made in the usual course of business, and within the so-called Confederate States, it will be enforced, and the party required to pay the value, in fact, at the time and place, although the contract was for the payment of Confederate Treasury notes; and we, believing that the holding in these two cases is not repugnant to, but in accordance with, and well sustained by, authority, reason and principle, adopt these judgments as being founded upon the sounder rule in law, and as being in harmony with sound morality, and, as a consequence, expressly overrule all of our cases, in which a contrary doctrine has been held.

In the case of *Thorington v. Smith*, approved in *Dean v. Younell's Adm'r*, the validity of these contracts was affirmed on two grounds.

First, that the paper was issued and imposed on the community as currency, by irresistible force.

Second, that in using it, the parties had no actual intent to further insurrection.

Judge Chase, in delivering what appears to have been the unanimous opinion of the Court, says:

“There are several degrees of what is called *de facto* Government.”

Such a government, in its highest degree, assumes a character very closely resembling a lawful government. This is when the usurping government expels the regular authorities from their customary seats and functions, and establishes itself in their place, and so becomes the actual government of a country. The distinguishing characteristics of such a government is, that

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adherents to it in war, against the government *de jure*, do not incur the penalties of treason; and under certain limitations, obligations assumed by it, in behalf of the country, or otherwise, will, in general, be respected by the government *de jure*, when restored."

But he denies that the Confederate States was a Government of this kind, because it succeeded in establishing its authority only over a portion of the territory of the government *de jure*.

But, he continues, "there is another description of government, called, also, by publicists, a government *de facto*, which might, perhaps, be more aptly denominated a government of paramount force. Its distinguishing characteristics are: First, that its existence is maintained by active military power, within the territories, and against the rightful authority of an established and lawful government; and second, *that while it exists, it must be obeyed in civil matters, by private citizens, who, by acts of obedience, rendered in submission to such force, do not become responsible, as wrong doers for those acts, though not warranted by the laws of the rightful government.* Actual governments of this sort, are established over districts differing greatly in extent and conditions. They are usually administered directly by military authority, but they may be administered *also by civil authority*, supported more or less directly by military force."

It is, then, expressly held that the Government of the Confederate States belonged to the latter class, that is, though not a government *de facto*, in the highest degree, it was a government of paramount force, and that

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“obedience to its authority, in civil and local matters, was not only a necessity, but a duty,” and that *“without such obedience, civil order was impossible.”*

After stating the fact that Confederate notes, while the war lasted, had a contingent value, and were used as money in all their business transactions, by many millions of people, Judge Chase states the conclusion of the Court in the following language: “It seems to follow, as a necessary consequence, from this actual supremacy of the insurgent government as a belligerent, within the territory where it circulated, and from the necessity of civil obedience on the part of all who remained within it, that this currency must be considered in the Courts of law, in the same light as if it had been issued by a foreign government temporarily occupying a part of the territory of the United States. Contracts stipulating for payments in this currency, can not be regarded for that reason only, as made in aid of the foreign invasion in the one case, or of the domestic insurrection in the other. They have no necessary relations to the hostile government, whether invading or insurgent. They are transactions in the ordinary course of civil society, and though they may indirectly and remotely promote the ends of the unlawful government, are without blame, except when proved to have been entered into with actual intent to further invasion or insurrection. We can not doubt that such contracts should be enforced in the Courts of the United States, after the restoration of peace, to the extent of their just obligation.”

To this reasoning we are compelled to give our assent. But while we thus fully concur in the con-

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clusion, we can not fully agree with the learned Judge in his premises. In our opinion, the distinction taken between a government *de facto* and a government of paramount force, is merely nominal, and not founded in any substantial difference. We can not agree that the usurping government must have expelled the lawful government from its entire territory, before it becomes a government *de facto*, nor that to constitute it such, it is necessary that its existence should be acknowledged by either the government *de jure*, or foreign governments. It may be a historical fact, that all the instances of governments *de facto* that have existed, involved the total subversion for the time, of the government *de jure* throughout its entire territory. But this does not affect the reason of the law applicable to such governments in fact, which is, as we understand it, that being of irresistible force and power, and some government being better than none, the citizen is excused and justified in obeying its laws, civil and military, and can not be questioned for doing so by the government *de jure*, when restored to its rightful dominion and authority. The matter is thus strongly stated by Blackstone: "When, therefore, a usurper is in possession, the subject is excused and justified in obeying and giving him assistance, otherwise, under a usurpation, no man would be safe, if the lawful prince had a right to hang him for obedience to the powers that be, as the usurper would certainly do, for disobedience. Nay, further; as the mass of people are imperfect judges of title, of which, in all cases, possession is *prima facie* evidence, the law compels no man to yield obedience

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to that prince whose right is, by want of possession, rendered uncertain and disputable, till providence shall think fit to interpose in his favor, and decide the ambiguous claim." See also, Vattel, pp. 97, 98, 99.

As to the value and authority of the opinion of this great commentator, on the principles of the common law, we deem it proper to here quote from the opinion of Judge Marshall; perhaps the greatest legal mind that this country has produced; in the celebrated treason case of Burr, as follows: "The superior authority of adjudged cases will never be controverted. But those celebrated elementary writers, who have stated the principles of the law, whose statements have received the common approbation of legal men, are not to be disregarded. Principles laid down by such writers as Coke, Hale, Foster and Blackstone, are not lightly to be regarded. These books are in the hands of every student. Legal opinions are formed upon them, and those opinions are afterwards carried to the bar, the bench and the Legislature, and," he adds, "are entitled to much respect."

Now, we ask, what possible difference can it be to the citizen or subject; and the whole question relates to him and his rights; whether the usurper has possession of the whole territory of the government *de jure*, or only of that portion of it where he resides and inhabits? Is he not as much subject to, and as much bound to yield obedience to the "powers that be," and does not the reason of the law apply as strongly in the one case as in the other? We, of course, do not mean to say that the reason of the law calls for its applica-

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tion to ordinary insurrections. But when a political power in fact, is set up and established, with well defined territorial limits, having a regular civil and military government, orderly, complete and efficient in all its parts—its legislative department enacting laws, which are duly promulgated; its executive department executing those laws, with unquestioned and unquestionable authority; its judges, everywhere, in the exercise of the functions of their offices, and an army in the field, capable, for the time being, to maintain the existence and absolute authority of the whole governmental fabric, to the entire exclusion of the power of the government *de jure*, although such government in fact may not have extended or assumed to extend its authority over the whole of the territory of the government *de jure*, yet, to all persons within its limits, it is, to all intents and purposes, a present, existing, omnipotent, military and political being; and all the principles applicable to the questions that spring inevitably from the existence of a government *de facto*, come into active operation, and become “the law of the case.” It is a maxim, that like reason doth make like law; and it has been well said, the law consists not in particular instances and precedents, but in the reason of the law; for reason is the life of the law.

But, conceding that the Confederate States did not constitute a government *de facto* in the highest degree, and can only be regarded as “a government of paramount force,” these transactions in Confederate notes had the sanction, authority and enforced circulation, of governments *de facto*, according to the most stringent and restricted

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idea and definition of such a government. Before the war, the several State governments were, unquestionably, governments *de jure*, to which their citizens owed allegiance, and which were endowed, under the Constitution and laws of the United States, with a sovereignty that enabled them to pass laws defining and punishing acts of war and resistance against them, as high treason. These State governments had and exercised immediate authority over the persons and property of all their citizens. The power of the State government was at the door of every citizen; its "dignity" constantly before him, and he dwelt continually within the shadow of its "peace." It was the municipal law of his State, administered and enforced by the judicial and executive officers of his State, that he studied, read and comprehended, and that protected him in the enjoyment of life, liberty and private property. And when these State governments, through and by their legislative and executive officers, attempted to sever the bonds that bound them to the General Government of the United States, and to become, as States, component parts of the revolutionary Government of the Confederate States of America, they passed laws requiring their citizens to withdraw their allegiance from the Government of the United States, and yield it to the Government of the Confederate States. They required their judges and all other officers to take oaths to support the Constitution and authority of the Confederate States, which they did; and those officers actually exercised the functions of their several offices under that Government. They passed laws requiring their citizens to render military service to

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the Confederate States, and rigidly enforced their execution. And what is more pertinent, if possible, to the present discussion, they enacted laws recognizing Confederate Treasury notes as a lawful currency and representative of value.

Now, grant that from and after May 6, 1864, as has been declared, the State Government of Tennessee was a mere usurpation, an unlawful and treasonable organization, yet it was a fact that existed; it was a Government that enforced its laws; it was a Government that actually, in the language of Judge Chase, expelled the regular and lawful authorities from their customary seats and functions, established itself in their place, and so became the actual Government of the country. In the language of Blackstone, a usurper was in possession, and the right of the lawful authorities, by want of possession, was rendered uncertain and disputable. *It* was, therefore, a government *de facto*, "in the highest degree," so closely "resembling the lawful government," that "the mass of the people," looking only to the possession, and being permitted to look only to the possession, were, by every law, human and divine, bound to yield to it their obedience in both civil and military matters, and are "execused and justified" in doing so.

But we will not pursue the discussion of this branch of the question any further. It is unnecessary to do so, as the authority which we adopt in settling this vexed question in our State, arising out of transactions in Confederate notes, holds that the paramount power under which they were issued and placed in circulation, be its proper name what it may, was sufficient to now sanc-

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tion such contracts in law. But it is very clear to our minds, that if the distinction taken by Judge Chase were substantial, and if it were necessary to uphold these contracts and to do justice, that they should have had, at the time they were made, the sanction of a government *de facto*, "in the highest degree," and exactly analogous to the European instances, that such a government, to say the least of it, and granting that it was a usurpation, existed in the State Government of Tennessee during the late war.

It has been frequently held, that, if the contract do not grow out of the illegal act, and is wholly unconnected with it, and is not a part of the original scheme, and founded on a new consideration, it is not tainted by the illegal act, although it may be known to the contracting parties.* Nor does it make any difference, that such new and independent contract is made with the person who is the contriver and conductor of the original illegal act, if it is wholly disconnected therefrom; *Armstrong v. Toler*, 11 Wheat. 261, 262; *Brooks v. Martin*, 2 Wal., 70. In the case of *Orchard v. Hughes*, 1 Wallace, 75, which was a suit brought by Hughes to foreclose a mortgage, Orchard set up, by way of defense, that a part of the consideration of the mortgage consisted of the bills of a bank that had not been legally chartered, which was a device to deceive the public, and which bills were fraudulently put into circulation, and were of no validity or value; but on it

* See *Naff v. Crawford*, ante p. 111; and see *Tedder v. Odum*, Nashv., 1870, Acc.

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being made to appear that the bills were current, and in circulation at the time they were received, and had a value in fact, and were actually used by the borrower, in the payment of his debts, it was held that the defense was not sufficient. It is, therefore, clear, that the two cases in 8 Wallace, are well sustained by authority on this point, and we are also well satisfied with the manifest justice and reason of the rule.

We are fully impressed with the importance of uniformity of decision, acknowledge the soundness of the doctrine of *stare decisis*, and admit the evils that attend a constant fluctuation in judicial opinion. Precedents should, as a general rule, be duly regarded and implicitly followed. But there are cases that have been so ill-considered, and that are so palpably wrong, that it becomes the duty of a succeeding Court to overrule them. Such cases have been frequently overruled, both in this country and England; Mr. Greenleaf has published an entire volume of them; and Judge Kent said that he knew more than one thousand cases that had been overruled, doubted, or limited in their application. The language of Sir William Jones, in his Essay on Bailment, is, therefore, too strong, when he says, "no man who is not a lawyer, would ever know how to act; and no man who is a lawyer, would, in many instances, know what to admit, unless Courts were bound by authority, as firmly as the Pagan Deities were supposed to be bound, by the decrees of fate." 1 Kent, 477.

Where a decision, or a series of decisions, have established a rule of property, and more particularly, a rule affecting title to real estate, which has become gen-

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erally known and been acted upon, such a land-mark should not be disturbed. But where there is no such restraining consideration; where the thing determined is of recent origin, not supported by former precedents, but contrary to the highest and most respectable authorities of other States, and of the United States; where the decision has not met the approbation of the profession at large, nor of the people; where it is clearly repugnant to the principles of common justice, and has had the practical effect to enable one man to take an undue advantage of another; such decision, or series of decisions, should be examined without fear, and revised without reluctance, rather than have the character of our law impaired, and the beauty and harmony of the system destroyed by the perpetuity of error. 1 Kent, 477; Haywood, Judge, in *Barton v. Shall*, Peck, 231, 232.

For these reasons, we feel warranted in departing from the past course of decisions in this State, on the "Confederate money question," and in adopting the doctrine asserted with so much force of reason in the national tribunal of last resort. In doing this, we, in fact, produce uniformity of decision. We but make the rule the same in our State Courts, with the rule in the Federal Courts sitting in our State, and with the Courts in our sister States. In doing so, we do no one any harm. The question is not one of that character that disturbs a land-mark of property, or a right vested or acquired, under the former decisions; at least not any that is founded in justice or right. It is true, many demands of this character have passed into judgment against them, for which there is now no rem-

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edy; but that is no reason why other parties should be denied their right to receive the actual value of that which they parted with, to another's profit to that extent, at the time and place.

The state of the pleadings in this cause, do not require any adjudication as to the measure of damages to be recovered in an action founded upon a contract to pay Confederate notes, and we consequently make none.

The decree of the Chancellor will be reversed, and the bill dismissed.

R. A. CONLEY, Adm'r, *et al.* v. Z. L. BURSON and JAS.
H. DUNCAN, Ex'r.

1. CONFEDERATE TREASURY NOTES. *Enemy relation.* Confederate Treasury notes, as a consideration passing from a person resident within the Confederate lines, to an attorney in fact of one resident in the loyal States, were not a valid and legal consideration.
2. POWER OF ATTORNEY. *Revoked by war.* A power of attorney from a person in a loyal State to one in the Confederate States, to sell land in Tennessee, was revoked by the existence of the war.
3. SAME. *Sale after revocation.* A sale being made under such power of attorney, for Confederate Treasury notes, received by the agent, the loss by the failure of value in the notes, falls upon the buyer.

FROM WASHINGTON.

From the Chancery Court at Jonesboro. J. P.
SWANN, Ch., presiding.

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The powers of attorney mentioned in the opinion were executed in November, 1860, by Rachel and John B. Duncan, they being citizens of Iowa, where they continued to reside during the war. Conley, the attorney, made his deed to the lands, lying in Washington County, Tennessee, June 20, 1863.

DEADERICK, J., being of counsel, did not sit in this case.

W. H. MAXWELL, for complainant. Cited Story on Agency, §§ 224, 229, 230, 435 to 439.

He insisted that Confederate Treasury notes were not a legal currency in discharge of obligations to persons in loyal States, and that it was unlawful for an agent to receive them, and cited *Stewart v. Donelly*, 4 Yerg., 177; *Cooney v. Wade*, 4 Hum., 444, 446; *Kenney v. Hazeltine, Haddock & Co.*, 6 Hum., 62; *Harold v. Gillespie*, 7 Hum., 57; *Baldwin & Campbell v. Morrill*, 8 Hum., 132; *Rankin v. Eakin*, 3 Head, 229; *Shurer v. Green*, 3 Cold., 419.

Trading between the two sections unlawful: *Graham v. Merrill & Clift*, 5 Cold., 622; Wheat. Law of Nations, 456 to 556; *Griswold v. Washington*, 15 Johns., 57; 1 Duer on Ins., 478; Hosack's Rights of Neutrals, 88, cited in Wheat. Int. Law, 555, 556, 557, n. 176; Act of Congress, July 15, 1861; *Anderson and wife v. Bedford*, 4 Cold., 464.

R. M. BARTON for respondent.

TURNEY, J., delivered the opinion of the Court.

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The Chancellor's decree declaring void the power of attorney of Rachel Duncan to Josiah Conley, of November, 1860, and the power of attorney of John B. Duncan to Josiah Conley, of November 7, 1860, and the deed of said Conley, as attorney in fact for the two above named parties, to Z. L. Burson, made June 20, 1863, is correct. The facts necessary to be noticed are: Richard and John B. Duncan were the children of Joseph and Molly Duncan, who, after making a joint will, appointing defendant, James W. Duncan, executor, died. By the will, certain lands were devised to their children, including Richard and John B., who lived in Iowa. At the times mentioned above, the powers of attorney were executed. Assuming to act under these powers, Josiah Conley, as attorney in fact, representing Rachel and John B., joined others in the deed of 20th of June, 1863, to Burson, conveying their interests in a tract of land of about 530½ acres. After this, Rachel died, leaving her husband and the heirs at law mentioned in the bill, who joined in this suit, asking to have the deed, as to the two interests, declared void, and the cloud removed from the title. Josiah Conley resided in Tennessee, and is dead. The tract of land is in Washington County, Tennessee. Rachel lived in Iowa to the time of her death. John B. still lives there.

Without expressing an opinion as to the validity or invalidity of the powers of attorney, or of the deed as to the two interests of John B. and Rachel, as appearing upon their faces or from their execution, but treating them as regular in these respects, we hold the

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deed void, for the reason that war existed at the time of the making of the deed, in which the two States of which the makers of the power of attorney and the attorney in fact, were respectively residents and citizens, were antagonistic. By the general law, a state of war puts an end to all executory contracts between the citizens of the different countries. Whatever contract remains then *in fieri*, is either suspended or dissolved, *flagrante bello*. 19 Johns, 138. The war between the States revoked the powers of attorney from John B. and Rachel Duncan to Conley; therefore, the deed was without authority.

Defendant Burson, in his answer, asks that it be filed as a cross bill; and if his title under the deed is not good as to the interests of John B. and Rachel, he asks that the administrator of Josiah Conley account for the money paid to him on the purchase of the two interests. Without deciding whether he is properly in court by his cross bill, we are of opinion the relief asked can not be granted.

The pleadings and proof satisfy us that the payment was in Confederate money. Under the rule, as declared by the Supreme Court of the United States, and by this Court during the present term, the defendant is not entitled to an account for the money paid by him. The fact that the Confederate States was a government *de facto*, or a government of paramount force, can not affect the rights of a citizen of a State at all times acknowledging the Government of the United States, and at no time interrupted in that acknowledgment by the Confederate Government or it

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armies; and while, as between citizens of States in secession, Confederate money did have a value, this was not so as between citizens of what were called the loyal States, nor as between citizens, on the one side, of the seceding States, and on the other of the loyal States not acting in sympathy with the cause of the South, and not trading upon terms of equality. During the civil war, all commercial intercourse with the enemy was prohibited by the Act of Congress of 1861. Revenue Cases, 66; Prize Cases, 291. In a State of war, the nations who are engaged in it, and all their citizens and subjects, are enemies to each other; hence, all intercourse and communication between them is unlawful. 18 How., 110. The tenor and meaning of the decisions of this Court, since its reorganization, are, that the States of the Union at war with each other were, in that war, as separate and distinct nations, and the citizens of each enemies of the other. It therefore follows, that their intercourse and communication was unlawful; and if citizens of Iowa were forbidden by the laws of war, or by the statutes of the General Government, of which they were citizens, to trade with a citizen of Tennessee, for the same reason they could not so trade through an agent or attorney in fact. And if, before the war, they constituted an attorney, and by the war the appointment was revoked, the action of the attorney in fact was a nullity, and communicated no title to the vendee. At the time of the conveyance, Conley, the attorney, and Burson, the purchaser from him, were bound to take notice of the existence of the war, and the political relations of themselves and John

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B. and Rachel Duncan thereto, and its legal effect. Burson had actual notice of the character in which Conley assumed to act; no fact was concealed from him. It results, therefore, that the payment of the purchase money by him to Conley was not for the benefit of John B. and Rachel, but was, in legal contemplation, no more than a deposit for his own use; he might have withdrawn it at any time; and if, when demanded, Conley had refused to return it, he could have made him liable for it or its value. Failing to do this, and the currency becoming valueless in the hands of Conley, without appropriation by him to his use, the loss falls upon Burson.

Affirm the decree.

WM. C. SCRUGGS OF JOHN v. WM. LUSTER and ABIJAH
SCRUGGS.

1. **USURY.** *Conventional interest law. Void note. Original consideration. Renewal.* If a note was void under the Act of 1860, to allow conventional interest, because it reserved ten per cent. upon its face, not being for loaned money, but a pre-existing debt, yet the original consideration if valid, would not be affected by the subsequent illegal note, and an action might be maintained thereon, and a note given in renewal of it without the illegal reservation of usury, will be valid, though the usury be added in.
2. **CONFEDERATE NOTES.** *Payment in, to Agent or Bailee.* A note placed in the hands of another as a collateral security, or as agent for collection, being paid to the holder in Confederate money, did not bind the payee or release the debtor, where the payor knew the nature of the holder's right, or was put upon inquiry as to it.

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3. **EQUITY JURISDICTION.** *Legal remedy embarrassed.* A note deposited as security, being delivered up and renewed by the payor delivering to the holder a new note, payable to the owner, the new note was collected in Confederate money, by the holder, and delivered up after the liability for which he held it, had ceased. Held to be a proper case for equity jurisdiction.
4. **CONFEDERATE TREASURY NOTES.** *Value to be accounted for.* The bailee having received Confederate notes will be required to account to the payor for their value at the time they were received.
5. **COLLATERAL SECURITY.** *Conversion.* The bailee held liable for a conversion of the note.

FROM GREENE.

Appeal from the Chancery Court at Greeneville.

The transcript does not show what Chancellor presided when the decree passed.

R. MCFARLAND and R. MCKEE for complainant; cited *Barton v. Kilgore*, MS., to show that a note given in renewal of one which provides on its face for payment of usury, would not be illegal. Agent or bailee could not receive Confederate notes. *Shurer v. Green*, 3 Cold., 419. If the payor was discharged, the payee would be liable. Adding usury unto note only affects the part, not the whole; King's Dig., Tit. Usury.

BARTON, MCFARLAND & EVANS for defendants. Act of 1860, made note, not for loaned money, void, if it bore more than six per cent. Citing *Wetmore v. Brien and Bradley*, 3 Head., 723; *Turner v. Odum*, 3 Cold., 455. Including usury in the new note made it void. *Turner v. Odum*, 3 Cold, 455; *Potts v. Gray*, *Id.*, 468; *Cate v. Blair*, 6 Cold., 639; 2 Kent, 468.

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TURNEY, J., delivered the opinion of the Court.

The decree of the Chancellor is erroneous. The facts necessary to be noticed are: In 1861 the complainant held a note on defendant Luster for the sum of seven hundred and forty-three dollars and five cents, bearing interest at the rate of ten per cent., due 2d January, 1861; the date of the note does not appear, but from the proof in the record, it had been executed a considerable length of time prior to its maturity. To induce defendant Abijah Scruggs, to become security for the prosecution of a suit in the Circuit Court of Greene County, complainant placed in his hands the note as indemnity, taking the following receipt, viz:

“Received of Wm. C. Scruggs of John, a note on William Luster for seven hundred and forty-three dollars and five cents, due 2d January, 1861, bearing interest at ten per cent., and which note is placed in my hands to make me safe for going his and John Scruggs’ security in a suit Sarah Cook against J. R. Cook and Allen Barker, now in the Circuit Court of Greene County, Tenn. Now, if I, Abijah Scruggs, my heirs or executors, should have to pay any costs, it is to come out of this note, and if I have none to pay, then I am to return or account to said Wm. Scruggs of John, for this note and interest.

Signed,

ABIJAH SCRUGGS.”

“Attest:—W. C. MALONEY.”

On the first day of January, 1862, Abijah delivered to his co-defendant, Luster, the note at ten per cent., and took a new note for eight hundred and seventeen dollars

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and thirty-five cents, payable to complainant. Afterwards, and while complainant was in the Federal army, defendant, Abijah, collected of Luster the amount of the second note in Confederate money, and delivered the note to Luster.

The original note was given for purchase money of land.

The bill, which is not sworn to, is filed for the purpose of requiring the defendant to account for one of the notes, prays for general relief, and alleges that the renewal note was taken without the knowledge or consent of complainant.

The answer of Abijah, which is sworn to, very positively denies this allegation, and in response thereto, says: "Upon this occasion, the complainant came with defendant Luster to this respondent, and said they had agreed to make the alteration in the note."

The answer of Luster which is sworn to, says, "That he heard that Abijah Scruggs was liable in some way as the security of William Scruggs, or some one else, and that the note was to indemnify him from loss."

The question raised in argument upon the allegation of the bill that the note was renewed without the knowledge or consent of complainant, and the denial by the answer of Abijah Scruggs and his statement, that complainant was present and consented, the question being on the one side, that complainant is estopped by his bill, and on the other, that such allegation is merely the suggestion or dictum of counsel, is unnecessary for our discussion or determination, in order that we may arrive

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at a correct conclusion in this case. There are several other questions which are decisive upon the merits.

1st. There was even behind and away from either of the notes mentioned in the pleadings, an indebtedness from the defendant Luster, to complainant, based upon a valuable consideration, and we hold the law to be that, although the first or ten per cent. note was void under the Act of 21st of February, 1860, complainant might have, all other questions being out of the way, instituted his action of debt or *indebitatus* assumpsit, disregarding the note, and have recovered the amount agreed to be paid for the land.

2nd. The note was placed in the hands of defendant for a particular purpose, viz: to indemnify him as security for costs.

But, supposing the defendant had received the note, with authority to collect the amount due, and, in discharge of that undertaking had collected Confederate money, the principal would not be bound by his action, nor would the debtor be released.

An agent for collection has no right to receive in payment of his principal's debt, any thing but money. *Cooney v. Wade*, 4 Hum., 445; *Kenney v. Hazeltine, Haddock & Co.*, 6 Hum, 62.

At the time of the transaction, making the facts and history of this case, nothing but gold and silver was money. Even convertible bank paper, when tendered in payment of debts and objected to upon the grounds that it was not money, was rejected by the law as no tender. Confederate notes were not convertible bank notes, were never made, by the Confederate Government

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even, a legal tender; and, in fact, never became due, their maturity being fixed at the time of a ratification of treaty of peace between the Confederate States and the United States.

3d. Defendant Luster knew that his co-defendant Abijah, held his note to complainant to indemnify him as security, at least by the terms of his answer. He had heard so, and without positive knowledge of the fact, the information he had received was sufficient to put him upon inquiry as to the character of Abijah's holding. He elected not to inquire, but gave his second note, payable to complainant at six per cent., in renewal of the first or ten per cent. note, to Abijah, and afterwards paid off said latter note in Confederate money to Abijah, and took up the note from Abijah in the absence of complainant, and after the liability of Abijah on the prosecution bond had ceased.

This is a proper case for account, and the demurrer was rightly overruled. Complication and embarrassment to the rights of the parties have grown out of the transactions between the defendants Luster and Abijah Scruggs.

The transaction between the defendants, Abijah and Luster, in the passing and receipt of the Confederate notes, was an ordinary one, and not intended to further the rebellion. We, therefore, following the decision of the Supreme Court of the United States in the case of *Thorington v. Smith*, 8 Wallace, p. 1, hold that Confederate money had a value in the States in rebellion and under Confederate rule; that out of the receipt of the Confederate money by Abijah Scruggs, from defendant Luster, grows an implied undertaking upon the part of

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Abijah Scruggs, to account to defendant, Luster, for the value of the Confederate money so by him received, and that he is responsible to Luster for the value of the Confederate money at the time of its receipt, with interest.

We also hold that Abijah Scruggs and William Luster must pay to complainant the amount of the second note with interest less the usury of four per cent. embraced in the renewal. In other words that they pay to complainant the sum originally agreed to be paid for the land, which is seven hundred and forty three dollars and five cents, and the legal interest thereon, from its maturity; Luster being first liable, and in case of his failure, then Abijah. Defendant Abijah, by his breach of trust and violation of the conditions upon which he held the note in converting it to his own use, made himself responsible.

A decree will be entered by this Court for the debt and interest due complainant. The cause is remanded to the Chancery Court at Greeneville, that an account may be taken of the value of the Confederate money upon the principles of this opinion. The defendants will pay the costs of this Court and of the Court below.

BARTON filed a petition for rehearing and brief, insisting upon the authorities in his former brief; and further, that the original debt was merged in the first note, citing *Nunnely v. Doherty*, 1 Yer., 26; *Fain v. Garner*, 1 Yer., 32; *Waugh v. Carriger*, 1 Yer., 31; *Isler v. Baker*, 6 Hum., 85.

The prayer of the petition was disallowed and a rehearing refused.

M. G. Parkey *et al.* v. Henry Yeary, Adm'r.

M. G. PARKEY *et al.*, in error, v. HENRY YEARY,
Adm'r of ALEXANDER MONTGOMERY, dec'd.

1. ERROR. *Evidence to support verdict.* In trespass for driving the plaintiff's intestate from his home, causing him to be exposed to inclemencies of weather, whereof he sickened and died—held, that proof of injuries received in a fight in November, 1861; of his leaving in April, 1862; driving teams until December; then teaching a short time; then driving teams; being exposed therein to bad weather, and dying in January, 1863, he attributing his death to exposure, was no proof to support a verdict for the plaintiff.
2. EVIDENCE. *Declarations. Res gestæ.* Declarations of the deceased under the above state of facts, made at the time of leaving home, as to his motive and intention, were not admissible as evidence.
3. SAME. *Same.* Declarations as to an injury received are only admissible when made before the party has time to devise anything for his own advantage.

FROM HANCOCK.

Trespass, in the Circuit Court. E. E. GILLENWATERS, J., presiding.

R. M. BARTON, JAS. T. SHIELDS and S. T. LOGAN,
for plaintiffs in error.

W. R. EVANS, for defendant.

TURNEY, J., delivered the opinion of the Court.

There is no evidence in the record to support the verdict. The suit was instituted in the Circuit Court of Hancock County, by the defendant in error, for the widow and heirs at law of Alexander Montgomery. The

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declaration avers that the plaintiffs in error beat, bruised, shot, cut and ill-treated the intestate, and by force and violence drove him from his home, thereby causing him to lie out in the woods, exposed to the elements and inclemencies of the weather, whereby his health was greatly impaired and injured, and of which said injuries he lingered in pain, until of said injuries he died, &c.

The facts are, that on the 14th of November, 1861, the plaintiffs in error, or some of them, as is shown by the record, went to the house of intestate, and demanded of a son of intestate his arms. Intestate came out of his house, and ordered them off; a fight ensued, in which intestate was cut with an ax just above the knee. That night intestate left home and went to the house of a neighbor, and remained away from that (Friday) night till Monday morning, staying one night in the woods. He walked on crutches about three months, and then used a cane. On the 11th of April, 1862, he left home for Kentucky, on foot; got to Barbourville in two or three days; went thence to Lexington with a Federal wagon train, and was employed most of the remainder of the year driving teams. In December, 1862, he taught school for a short time; soon quit school-teaching, and again engaged with a wagon train. At Lexington, he, as teamster, drove six mules to London; returned to Lexington, and made two trips to Cumberland Gap; attended to his teams himself, and when Bragg's army was in Kentucky, took his train to Jeffersonville, Indiana. In October, 1862, he took a second train to Louisville, and went to Lebanon; slept in a wagon; was engaged as wagon-master, conducting

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trains. The weather was bad, and he was necessarily exposed in being with the trains; was taken sick, and on the 23d of January, 1863, died. He attributed his sickness to exposure and cold, and said nothing about its being a result of his wound.

This is the proof of his son, William Montgomery, who went from home with him and remained with him to his death.

There was verdict and judgment for defendant in error, for five thousand dollars, from which there is an appeal to this Court.

We have given the facts a critical examination, and are wholly unable to discover any, the slightest or most remote connection between the wound and the death of the intestate. The proof is clear that he had recovered from the wound and its effects, long before his death, which was the result, as proven by his own declarations, of cold and exposure.

In his charge, his Honor, the Circuit Judge, said to the jury: "To ascertain the influences under which the deceased abandoned his home, the jury will look to his declarations while preparing to start, while in the act of starting, while on his journey and during his stay."

This is error. The principle is much too broadly stated for any class of cases, and has no application to the one at the bar. The rule is intended to apply generally in cases where acts have been done, to which it is necessary to ascribe a motive; then what the party has said at the time, is admissible for the purpose of explaining the act, and when offered by declarant, only as evidence going to the relief of the party making the

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declarations, from a responsibility or liability, which the act, left unexplained, might attach to his conduct.

Under the charge of his Honor, the jury was authorized to look, not only to the motive which prompted the deceased to leave his home, but as well, to all extraneous influences of any kind, without regard to time or circumstances, or the character of any such influences.

In actions of trespass, such as this, the declaration of a party to be used as evidence for himself must be made immediately on receiving the injury, and before he had time to devise any thing for his own advantage.
1 Starkie on Evidence, 268.

Judgment reversed and cause remanded.

PLEASANT A. WITT, Plaintiff in error v. ALEXANDER
HAUN, JR., by his next friend.

1. EVIDENCE. *Grounds for contradiction.* Where a witness was asked as to a conversation, with a view to contradict him, the place and the conversation being stated, the time being fixed as a *short time* before a certain named event, the actual time being about three weeks before the event, the transaction having occurred several years before, it was held sufficient to admit the impeaching statement.
2. SAME. *Threats.* The court having admitted vague threats against Union men who had been troubling the plaintiff in error, charged the jury that they could only look to the threats if they were satisfied that they were aimed at the defendant. There being evidence that the plaintiff was believed by defendant to be out of the country, it was held

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that the evidence of the threats, if admissible at all, should have been submitted in connection with the fact of plaintiff's supposed absence.

3. SAME. *To support verdict.* What evidence is sufficient to support a verdict.

FROM JEFFERSON.

From the Circuit Court of Jefferson County, J. P. SWANN, J., presiding.

THORNBURG and MCFARLAND for plaintiffs in error.

BARTON & MCFARLAND for defendants.

NELSON, J., delivered the opinion of the Court.

This suit was commenced on the 7th of August, 1865, in the Circuit Court of Jefferson County, by Alexander Haun, Jr., who sues by his next friend, Alexander Haun, Sr., for trespass, assault and battery, and false imprisonment, against Pleasant A. Witt; and verdict and judgment were rendered at the April Term, 1868, for fifteen hundred dollars. It seems, from the evidence, that the plaintiff in error, who resided in the vicinity of Bull Gap, and was the owner of a mill, which, in the language of the witnesses, had been frequently "robbed," applied to Col. Giltner, then in command of the Confederate forces, to send a scout for the purpose of breaking up a band of forty or fifty white men and negroes, ("bush-whackers," as they are styled by one of plaintiff's witnesses,) who were encamped in the neighborhood, belonged to no regular command, and were supposed to be the persons who had pillaged the mill. The scout was sent, and the defendant in error and his brother, Henry

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C. Haun, who were supposed to be absent, and in the rear of the Federal army, but were, in fact, secreting themselves in order to avoid conscription into the rebel service, were arrested and taken, first, in Bull Gap, and then to a place near Midway; that they were detained in custody some eight or ten days, when they were released. It does not appear that the plaintiff in error was present at the arrest, or at any time exercised any control over the prisoners; and the question of fact, in the Court below, was simply whether he had caused and procured the arrest to be made. He was then sixty-five or seventy years of age, and was the uncle of the prisoners. There was no direct evidence that he had any agency, whatever, in procuring the arrest, but this was sought to be established by circumstantial testimony, and by proof of his conversations; while he, on the other hand, established the fact that, at the time of the arrest, he was at his own house, about one and-a-half miles distant, and proved by Col. Giltner, whose deposition was taken in Kentucky, that he exerted no influence in procuring the arrest, and had petitioned him to release the prisoners.

The principle witness against the plaintiff in error was his miller, one Rufus Brown, who, among other things, stated, that immediately after the prisoners were taken by his house, he went down to the house of plaintiff in error, who told him that "he had been the instigation of their arrest; that he thought these boys were in Kentucky, but the soldiers had them, and had hung one of them, and he had been the instigation of it." On cross-examination, he denied that he informed the plaintiff in error that there were men hiding in the woods

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who had "robbed" the mill, and that he had urged him to go to Bull's Gap and get soldiers to arrest them, but said he had told the plaintiff in error that the rebel soldiers, as they passed, were robbing the mill, and had asked him to go to the Gap and get protection papers. He was asked by the counsel for the plaintiff in error, "if he had not, at the residence of defendant, a short time before the arrest of the Hauns, and in the presence of James C. Witt, on two or three occasions, told defendant that there was a crowd of men hiding around in the woods near the mill; that the mill had been broken into, and he must go to Bull's Gap and get soldiers to stop them, or they would suffer; and if defendant, in reply, did not refuse, and say he would have no hand in bringing a scout there? Witness denied having any such conversation." The deposition of James C. Witt was taken to contradict this witness, and part of it was allowed to be read to the jury; but his Honor refused to allow the following statement, in the deposition, to be read, viz: "I was at P. A. Witts' two or three weeks before Alexander Haun's sons *was* arrested in the woods and *took* to Bull's Gap to Giltner's headquarters, as I understood. R. Brown came to P. A. Witt, and said the mill had been broken into and robbed. Brown the miller, came to P. A. Witt and said the mill had been robbed again, and wanted P. A. Witt to go to the Gap and get a scout and search the woods, and see if they could not stop the mill from being robbed, or their family would suffer. P. A. Witt refused to do so, saying that he did not want a scout after any one."

It is a familiar rule that "it is not irrelevant to in-

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quire of the witness whether he has not, on some former occasion, given a different account of the matter of fact to which he has already testified, in order to lay a foundation for impeaching his testimony by contradicting him." 1 Greenl. Ev., § 449, 2d ed. But "before this can be done, it is generally held necessary, in the case of verbal statements, first, to ask him as to time, place and person involved in the supposed contradiction. It is not enough to ask him the general question, whether he has ever said so and so, nor whether he has always told the same story, because it may frequently happen, that, upon the general question, he may not remember whether he has so said; whereas, when his attention is challenged to particular circumstances and occasions, he may recollect and explain what he has formerly said. 1 Greenl. Ev., § 462, 2d ed.

It is not possible, owing to the frailty of human memory, as a general rule, to fix, with accuracy, the precise day or hour, when any conversation occurred, and we are of opinion that, as the attention of the witness intended to be impeached, was directed to a conversation occurring at the residence of defendant, a short time before the arrest, and as the impeaching witness detailed conversations occurring at the place designated, within three weeks before the arrest, this was sufficient to satisfy the object of the rule, and to allow the impeached witness a reasonable opportunity for explanation; and the entire deposition should have gone to the jury, so as to enable them to weigh the evidence, and determine to which of the witnesses they would give credit. In this case, it is apparent that the evidence was material

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for the plaintiff in error; as Noah Witt, a witness, who was referred to by Brown, as being present when the plaintiff in error said he had been the instigation of their arrest, contradicted this, and other statements, alleged by Brown to have been made in the same conversation; and testified, further, that he had heard the plaintiff in error ask the guard, as they passed along with the prisoners, to have them turned loose, and heard him say to the guard, that they were his neighbors and relatives, and that he desired they should be treated kindly.

W. C. Witt, a witness for the plaintiff below, stated that "in the spring of 1864, he had heard defendant make threats against Union men, and defendant was a rebel; and that defendant was complaining that some of his Union neighbors had been troubling him, and been there after him, and had made him run from his house after night, and the rebels were here now, and that he did not intend that they should stay at home." This evidence was objected to, and allowed by the Court to go to the jury "for the present;" and his Honor, in his charge to the jury, said: "The jury can only look to any threats in proof, of the defendant, if they are satisfied such were aimed at the plaintiff, or if such threats comprehend him within their scope and meaning." As there is evidence, in the record, tending to show that the plaintiff in error, at and before the time of the arrest of defendant and his brother, believed that they were not in the neighborhood, the evidence of W. C. Witt, if admissible at all, should have been submitted in connection with that fact. But the witness express-

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ly stated that he did not hear the names of the Hauns mentioned, and it does not appear, from his testimony, whether the conversation to which he testified was before or after the arrest of defendant in error. The conversation was too vague and general, perhaps, to be admissible within the well established rules of evidence, and the jury were not instructed as to the manner in which they were to ascertain whether they were aimed at the plaintiff, or whether he was comprehended within their scope and meaning. The conversation was vague and general, and does not seem to have been connected by any other proof or circumstance with the defendant in error.

Aside from these errors in the proceedings in the Court below, we feel constrained to observe, after a careful examination of the entire record, that we are not satisfied that the evidence is sufficient to support the verdict, as the case presented in it seems to rest entirely upon casual conversations—the weakest of all human testimony. See 1 Stark. Ev., 484; 1 Greenl. Ev., § 200. It was tried, moreover, on the 21st of April, 1868, when the mode of selecting juries, as then established by statute, was of such a character as to occasion general distrust in regard to the impartiality of jury trials in this State.

Reverse the judgment.

Wm. Lay v. J. E. Huddleston.

WM. LAY, in error, v. J. F. HUDDLESTON.

1. EVIDENCE. *To support verdict.* Proof that the defendant came to a house near the plaintiff's, with a party of Southern cavalry; that he was in search of his son, who had been taken off by the party of Federal soldiers, of whom the rebels were in pursuit; that he was seen talking with the officer in command, who had previously ordered horses to be collected, and who wanted to employ a courier; that he was seen pointing in various directions; that he disappeared, but before he had time to have aided them, some rebel soldiers came up with the plaintiff's horse, for the taking of which, this suit was brought; held that this proof, though a ground of possible inference that the defendant indicated the taking of the horse, is not sufficient proof to support a verdict.

FROM UNION.

From the Circuit Court of Union County, J. P. SWANN, J., presiding.

JAS. R. COCKE, for plaintiff in error.

M. L. HALL for defendant.

NICHOLSON, C. J., delivered the opinion of the Court.

This was an action of trespass, commenced in the Circuit Court of Union County. The allegations in the declaration are that the plaintiff in error, took from the defendant in error, a mare, to his damage two hundred and fifty dollars. The plea is, not guilty.

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At the June Term, 1868, the case was tried before a jury, who rendered a verdict for two hundred and eighty-six dollars, of which the defendant in error remitted thirty-six dollars. A motion for a new trial was overruled, and an appeal in error to this Court.

We are called upon to reverse the judgment in this case, for the want of sufficient evidence to support the verdict. This imposes upon us the duty of giving to the proof in connection with the charge of the Circuit Judge, a careful examination.

The allegation in the declaration is: "The plaintiff sues the defendant for two hundred and fifty dollars, for damages for wrongfully taking from him one bay mare." The Circuit Judge charged the jury, that "in order for a recovery the proof must show that the defendant took the mare sued for, himself; or that he aided and abetted in the taking; or that he was present, and willing to aid and abet and assist in the taking, if assistance should be needed, and was there for the purpose, consenting unto the taking; or if the proof shows that a combination or conspiracy was entered into by the defendant with others, to take the mare, and that she was taken in pursuance of such conspiracy, each and all of such conspirators thus conspiring, would be liable in law. In case the proof show that the defendant, with others, were engaged in an unlawful purpose, aside from the taking of the plaintiff's mare, as for instance, in a war against the United States, and some of the men so engaged took the mare, the defendant would not be liable for their acts, unless he had a hand in the taking of said mare.

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The proof is as follows: J. J. Sellers, witness for plaintiff, proved, that about the 20th of June, 1863, a body of rebel soldiers under command of Col. Scott, being in pursuit of a body of Federal soldiers, had stopped to feed their horses at the house of Mrs. Salling. Col. Scott was sitting on the fence in front of Wm. Colvins' door. Defendant was there with a gun. He was a citizen and came up with the rear soldiers. Col. Scott made inquiry as to who he could get to carry a dispatch to Jacksboro'; and defendant said, here is a man, (meaning the witness,) who knows the country; send him, and said something about witness being a suitable man to carry the dispatch; but witness excused himself. In a few minutes, defendant had disappeared among the soldiers, and witness did not observe where he went. This was all the conversation between defendant and Col. Scott, that witness heard; that, in a few minutes after defendant had disappeared from witness' observation, some rebel soldiers came up with plaintiff's mare; that defendant had not had time to have gone where the mare was kept, which was in a stable in a clover field, three or four hundred yards off; and that defendant was not along with the soldiers who brought the mare up; that those with plaintiff's mare went along the road the main body had taken, towards Clinch River. Defendant was with the soldiers, but in the rear.

G. I. Wade, for plaintiff, proved that he was present when defendant rode up to where the rebel soldiers had stopped, he saw defendant with Col. Scott for some time, but heard him say nothing; that, before defendant came, witness heard Col. Scott order a lieutenant to get thirty horses to carry dispatches.

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Charlotte Carr proved that she saw Col. Scott sitting on the fence, and the defendant was standing talking to him; that defendant talked and pointed or made motions with his hands, and pointed in the direction of plaintiff's, and towards Mrs. Salling's stable, and towards her brother's horses, and they all lost their horses that day; and on cross-examination, she said the pointing was throwing his arms around in every direction. This was all the proof of plaintiff bearing upon the taking of the mare.

L. C. Lay, witness for defendant, proved that he was the son of plaintiff, and was a rebel soldier; that he was taken prisoner by the Federals under Sanders, in Grainger County, south of Clinch Mountain, and was brought on by them and taken beyond Clinch River, where he was paroled and turned loose, and had recrossed the river and met defendant; that defendant started down the road, saying he was going down to Allen Hurst's to see Eb. Hurst, a wounded rebel; that witness came on; after some time defendant overtook and passed him, going towards home, where he was when witness got home. Defendant was in company with the rebel soldiers and was armed.

Jane Wolfenbarger proved that she was the daughter of defendant and lived with him; that he was at home the evening before the rebels passed in pursuit of the Federals, and was there when she went to bed and when she got up in the morning; that he was anxious to hear from, or of, his son, L. C. Lay, who was a rebel soldier, and defendant said he was going down to Maynardsville, to try to hear something of his son; that defendant had no gun when he started.

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The proof accounts satisfactorily for the presence of defendant with the rebel soldiers. He was anxious to hear of his son, who belonged to the rebel army, and availed himself of the presence of the rebel troops to go in search of information. This is made clear from the fact that when he met his son, he turned back and came home. There was nothing unreasonable, when going on business, and in such company, that he should carry a gun. Assuming, as we are authorized to do, from the proof, that when he came up with the rebel troops, where they had stopped, he was engaged in no unlawful enterprise, but merely in search of information as to his son, the question arises, did he say or do anything which, by fair implication, connected him with the taking of defendant's mare? It was natural that he should call on the commander of the troops, to let him know why he, being a citizen, was there. The proof of the only witness who heard the conversation, shows that the conversation between Colonel Scott and defendant, had reference entirely to the sending of a dispatch to Jacksboro', so far as the witness heard the conversations. There was, doubtless, other conversation not heard by the witness. If anything was said by defendant about plaintiff's mare, it was not heard by this or any other witness, and must be inferred alone from the proof of Charlotte Carr. She heard nothing, but saw defendant pointing or making motions with his hands. The pointing, she says in explanation, was throwing his hands around in every direction. That this pointing or throwing his hands around had no reference to the taking of plaintiff's mare is made reason-

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ably certain by the fact proven by Sellers, that the mare was brought up by some rebel soldiers, so soon after the conversation between defendant and Colonel Scott, that defendant could not have had time to go to where the mare was kept, and to have returned with her; and by the additional fact that defendant was not along with the rebel soldiers who brought up the mare. So far as the taking of the mare is concerned, it is perfectly certain that she was not taken by defendant; and the only ground upon which the jury could have determined that he was present, aiding or abetting the taking or consenting thereto, was, that witness saw defendant pointing or throwing his hands around in every direction. It is possible, but very improbable, that he may have been pointing out to Colonel Scott where plaintiff's mare was; but the other proof shows that it is more probable that the motions of his hands had reference to, or were produced by, the object of his visit to Colonel Scott, which was to obtain information as to his son. The verdict, therefore, rests alone upon the possible correctness of the inference that his pointing or throwing his hands around had some sort of connection with the taking of plaintiff's mare. We do not think that a verdict resting solely upon an inference possibly true is supported by any evidence. We are, therefore, of opinion the Circuit Judge erred in not granting a new trial. The judgment is reversed, and the case remanded.

J. M. Smith v. Gordon Carr.

J. M. SMITH, in error, v. GORDON CARR.

1. EVIDENCE. *Political opinion.* Proof that the defendant was a rebel, is admissible, to show his *animus*, in making certain declarations.
2. SAME. *Declarations. Res gestæ.* Declarations of a party taking property, not admissible for a defendant charged with complicity, though made soon after the taking, and while returning from the place of taking, with the property.
3. VERDICT. *Proof to support.* That the plaintiff had his horse concealed and while so concealed, two Confederate soldiers found and took him; that the defendant was out two or three days before, looking for a stolen mule; met a squad of soldiers who asked him if the plaintiff and others did not have horses; to which he replied that they had, and that he was a rebel, is no evidence to show that he had any thing to do with the taking.

FROM SULLIVAN.

From the Circuit Court of Sullivan County, E. E. GILLENWATERS, J., presiding.

The declarations which the Court held to render the fact of the defendant being a rebel, pertinent proof, was his answer to the soldiers, when they asked him if Carr, Hughes and others, did not have good stock, or good horses, and if they were not Union men, to which he answered that they had good horses and were Union men.

The declarations of the soldiers, which it was held proper to exclude, were a part of the deposition of

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Nancy Robeson, as follows, the part excluded being in brackets :

“During the war, two rebel soldiers came to our house, and inquired if Gordon Carr had any horses. I told them he had nothing but an old mare and colt, that I knew of. [They said they knew better, for early that morning, as they came down the road, they saw Mr. Carr going across the hill field, with an armful of feed, to a nag.] And they started off immediately in that direction, and returned in a few minutes, leading Mr. Carr’s horse by a rope around his neck. [They spoke to me, and said, we have got the nag that we saw the fellow going to feed].”

J. G. DEADERICK and F. W. EARNEST, for the plaintiff in error.

J. P. SWANN, for the defendant.

NICHOLSON, C. J., delivered the opinion of the Court.

This case was commenced in the Circuit Court of Sullivan County, and was transferred, by charge of venue, to Carter County. It is an action for damages, in causing the horse of defendant in error to be taken from him. After one mistrial, a verdict was found against plaintiff in error, and judgment rendered thereon.

A motion for a new trial having been overruled, the plaintiff in error appealed to this Court.

Three grounds are relied on for a reversal of the judgment:

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1. Because the Circuit Judge permitted the defendant in error to prove that plaintiff in error was a rebel. Although such evidence is, in general, irrelevant, and calculated to excite prejudice, yet, in this case, we are not prepared to hold that it was not legitimate, for the purpose of explaining the *animus* with which certain declarations of the plaintiff in error were made.

2. Because portions of the depositions of two witnesses detailing conversations of the rebel soldiers, who took the horse, were excluded from the jury. The declarations excluded were made by the soldiers soon after they had taken the horse, and whilst they were returning with him to their camp. As between the parties to this suit, these declarations were incompetent and were properly excluded.

3. Because there is not sufficient evidence to support the verdict. After careful examination of the proof, we are satisfied that this ground for reversal is well taken. The allegation in the declaration is, that plaintiff in error caused the horse of defendant in error to be unlawfully taken from him. The proof is abundant, that defendant in error had his horse concealed, to avoid his being taken by rebel soldiers, encamped in his neighborhood; and that whilst so concealed, two rebel soldiers found and carried him away. The evidence on which plaintiff in error is sought to be made responsible is, that two or three days before the horse was taken, he was out looking for a stolen mule, when he met a squad of rebel soldiers near the house of defendant in error; and in conversation with them, in answer to a question by

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them, whether defendant in error and other Union men named did not have horses, plaintiff in error replied that they had. This was all that he said, and this is all the evidence from which it could be inferred that he caused the horse of defendant in error to be taken, except the fact that he was shown to be a rebel. It does not appear from the evidence, that he requested or advised the soldiers to take the horse, nor that the soldiers who did take him were the same with whom he conversed. It is left in doubt whether the horse had not actually been taken before plaintiff in error met and conversed with the squad of soldiers. One of the witnesses of defendant in error testifies that the taking was two or three days after the conversation aforesaid, whilst a witness of plaintiff in error testifies that the horse was taken two or three hours before the conversation. It is in proof that defendant in error said, that no one except a man by the name of Robinson, who lived on his place, knew where his horse was concealed, and that Robinson was believed to have given the information to the soldiers of the place of concealment. Plaintiff in error is shown to have been a quiet, honest and truthful man.

After closely scrutinizing the whole evidence, we are unable to find any testimony on which the verdict of the jury can be supported.

The judgment is reversed and a new trial awarded.

C. B. Nance and Isaac Mitchell, v. S. F. M. Haney.

C. B. NANCE and ISAAC MITCHELL, in error, v. S. F. M. HANEY.

1. EVIDENCE. *To support verdict.* This court will only reverse upon conflicting evidence of facts, where there is a great preponderance of evidence against the verdict, so that the court can see clearly that the judgment of the law upon all the facts shown in the evidence, is not that which the jury have found.*
2. SAME. *Same.* Where the defendant had a son "captured" by a party of Union men going out of East Tennessee to Kentucky, during the civil war, and sent information to Strawberry Plains, where was some unorganized Confederate force, with a view to have them rescue his son, which information was received at 11 o'clock; at 12 o'clock, the same day, Captain Ashby and a force left Knoxville, 16 miles off, and captured a large body of men, with which the party first named had formed a junction, no force from the Plains being present or co-operating; no railroad train having gone from the Plains to Knoxville; there being no telegraph station there; and no proof being made of a courier being sent, and there being abundant means by which the information might have come from other sources to Knoxville, it was held there was not sufficient proof that the defendant had been in any way instrumental in the capture, to sustain a verdict in favor of one of the persons captured.
3. CASES REVIEWED: *Yarborough v. Abernathy*, Meigs' R., 418; *Angus v. Dickerson*, Meigs' R., 459; *Dodge v. Britain*, Meigs' R., 85; *England v. Burt*, 4 Hum., 401; *Petitt v. Petitt*, 4 Hum., 191; *Jones v. Jennings*, 10 Hum., 428; *Walker v. Galbreath*, 3 Head, 315.

FROM JEFFERSON.

From the Circuit Court of Jefferson county, J. P. SWANN, J., presiding.

J. R. COCKE, for plaintiff, in error.

GEO. ANDREWS, J. M. MEEK and L. A. GRATZ, for defendants.

*NOTE.—See *Foster v. Grizzle*, 1 Cold., 534; *Crutcher v. Crutcher*, 11 Hum., 377; *Allen v. McNew*, 8 Hum., 56; *Hutchins v. Bk. of Tennessee*, Id., 420; *Hutchins v. Sims*, Id., 425; *Gray v. Tate*, 4 Sneed, 595; *McNairy v. Thompson*, 1 Sneed, 153.—REPORTER.

C. B. Nance and Isaac Mitchell, v. S. F. M. Haney.

FREEMAN, J., delivered the opinion of the Court.

This is an action of trespass, commenced in Jefferson county, by the defendant, in error, against the complainants, in error, and one Hodges. A *nolle prosequi* was entered as to Hodges. The case was tried by his Honor, Judge Swann and a jury, at August Term, 1867, on a plea of not guilty. The jury, under the charge of the Court, returned a verdict in favor of the plaintiff against the defendants, for the sum of two thousand dollars. A motion for new trial was made, which was overruled by the Court, and defendants prayed an appeal in the nature of a writ of error, to this Court.

The ground assigned for reversal, in argument here, is, that the evidence does not support the verdict, under the rule laid down by this Court for its action, where reversal is sought on the facts of the case. It is proper, perhaps, in this case, that we review the leading cases on this question, and re-state the rule to be deduced from them, in precise terms, as there seems to be misapprehension as to what is the rule. It is frequently said here in argument, that this Court will not reverse on the facts of the case, or will not do so where there is *any* evidence to support it, even the slightest. This is not a correct statement of the rule, as will appear by reference to the cases in which the attempt has been made by the Court to lay down the rule with precision, though it may seem to find support in loose *dicta*, sometimes found in the opinions in our reports.

Among the early cases on this question, is *Yarborough v. Abernathy*, Meigs' R., 418. Judge Reese, de-

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livering the opinion of the Court, says: "This case is only another added to a long list of cases, in which we have been constrained to repeat that this Court neither can nor ought to weigh and balance the testimony, with a view to disturb the verdict of the jury and the judgment of the Circuit Court. We adhere to, and again announce the principle, as familiar from frequent repetition, as it is obviously correct, that we will set aside verdicts approved by the Circuit Court, in those cases only where the weight of the testimony against the verdict greatly preponderates."

In the case of *Angus v. Dickerson*, where the Court refused to set aside the verdict, the question being as to whether the hiring of a slave by Angus was a general or a special hiring, the Court says: "There was evidence conducing to prove that Angus had hired the negro specially to drive his wagon;" and in the conclusion of the opinion they say, "the whole case was left fairly before the jury; and had the verdict been either way, we should not have felt at liberty to have disturbed it."

In the case of *Dodge v. Britain*, Meigs' R., 85, Judge Turley says: "The jury were the proper judges of the credibility of witnesses and weight of the testimony; and this is not a case in which all the proof is on one side; and we have repeatedly said that we will not reverse, if there be any proof by which the verdict can be sustained." This was a case of conflicting evidence, and the opinion, taken in connection with the facts of the case, only announces the same principle found in the other two cases cited.

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In the case of *England v. Burt*, 4 Hum., 401, the Court, Judge Reese delivering the opinion, after announcing its inflexible adherence to the rule, and the fact that the Court had frequently been called on to repeat it, says: "The rule is, that, in matters of fact in civil cases, upon which the jury has rendered a verdict, which the Circuit Judge has refused to set aside, we will affirm the judgment of the Circuit Court, unless there be a great preponderance of evidence against the verdict." He then goes on to illustrate the rule, and says: "If four witnesses testify before the jury on the side of the plaintiff, to a given state of facts, and two witnesses testify to opposing facts on the side of the defendant, and the Circuit Judge refuses to set it aside, this Court will not disturb it under such circumstances."

The statement of this point by Mr. Meigs, in his Digest, vol. 2, p. 780, as the rule laid down by the Court in the case of *Petitt v. Petitt*, 4 Hum., 191, has misled some as to the terms of the rule. His statement is, "that it is an inflexible rule of this Court to suffer a verdict to stand where there is any evidence to sustain it, unless there is error in matters of law."

This is a correct quotation from a sentence of Judge Turley's opinion in that case; but it does not give a correct expression of what was the rule on which the Court acted, which was in no wise variant from the one stated by Judge Reese in the cases we have referred to above.

It was a case of contested will, where much testimony had been introduced on both sides, as to the sanity

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of testator. After commenting on the testimony, and citing much of it, the learned Judge said: "We have selected this testimony from the record, to show that there was proof before the jury, upon which their verdict against the validity of the alleged testamentary paper may be rested. On the other hand, there is much testimony that tends to show that the deceased was of sound and disposing mind and memory. Then follows the quotation selected by Mr. Meigs, above cited, as to the rule of this Court. It will be seen at once, taken in connection with the facts of the case, and the entire statement of the learned Judge, that it is precisely the same rule as found in all the previous cases in which the rule has been laid down by the Court.

The same remark may be made in reference to all the subsequent cases in our reports, such as the case of *Jones v. Jennings*, 10 Hum., 428; *Walker v. Galbraith*, 3 Head., 315, and other cases that might be cited.

From these cases we lay down the rule to be, that this Court will only reverse upon the facts of the case, where there is a *great* preponderance of evidence against the verdict found by the jury, so that we can see clearly that the judgment of the law upon all the facts shown in the evidence, is not that which the jury have found.

Applying this principle to the facts shown in the record, the question is, can this verdict be allowed to stand?

The facts material to be stated are, that in April, 1862, a large party of men started to Kentucky to avoid being drafted for service in the late civil war, as part of

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the militia of the State, under a law of the State Legislature, passed before that time.

These men were Union men as they are called in the testimony, and adhered to the Federal Government. They seem to have started in pursuance of a general understanding had between themselves, and to have been regularly organized and officered, as one witness says that at a certain point they waited to be joined by Captain Thornhill's and Captain Barrett's companies," and "that a man named Capps took command of the whole company on the hill beyond Bales'," and soon after this, as they moved on, they met Gentry West, a son of James T. West, and took him a prisoner; "captured him," in the language of the witness, and kept him, after dismounting him, and making him walk, until the whole party were captured on Thursday evening, 17th of April, by Confederate cavalry, under command of Captain Ashby. They also captured one Bunch, about this time, and took his horse from him.

This party moved on to a place called Fincastle, near which they were attacked by Ashby, and four hundred and twenty of them captured, after some fighting.

There were about one hundred of the party, perhaps, armed with guns, and most of them with pistols. On the way, they captured a lot of guns at Blains' Cross Roads.

It seems that the old man West, the father of Gentry West, who had been captured by this band, had heard of his capture, and, naturally as a father, was anxious to have him rescued or released if possible, and requested and urged the defendants below to go to Strawberry

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Plains, and report the route of the "stampede," as they were called in the testimony, to the troops at that point, that they might be captured, or at any rate, his son released from captivity, which seemed to be the leading object of the old man.

These parties went to Strawberry Plains, got there about eleven o'clock on Wednesday, reported the fact of the capture of young West, perhaps, to the soldiery there, which seems to have consisted of parts of unorganized companies of infantry. The defendants left soon afterwards, and returned home; were not present at the capture, and had no hand in the attack made by Ashby. That evening, after Mitchell and Nance left, about as many as one company of the soldiers at Strawberry Plains, marched off, but were seen after their return the next evening, back again in their tents at Strawberry Plains. No train passed down the road towards Knoxville after Mitchell and Nance were at the Plains, until about four o'clock, P. M., when the freight train passed this point. There was no telegraph office there by which the parties could communicate with rebel troops at Knoxville; nor was any messenger shown to have been sent to Knoxville; and if started from Strawberry Plains, after Mitchell and Nance reached there, a messenger could not have reached Knoxville in time to have given the information that caused the pursuit of the parties, and their capture, as Ashby seems to have left Knoxville about twelve o'clock on the day before the capture.

It is shown, too, that the country was full of rebel scouts, and that many private citizens acted as spies for rebel authorities, and gave them the information deemed

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important to them. The place of capture of the party, was between forty and fifty miles from Strawberry Plains.

We have given a careful examination to all the testimony in this case, and extracted from it the above statements, as its substance.

The Court is unable to see any evidence at all in this record, that in the slightest degree connects plaintiffs in error with the capture or imprisonment of the plaintiff below.

The only information they are shown to have given, was to parties at Strawberry Plains. But it was not the troops at Strawberry Plains that captured plaintiff. In fact, it was impossible they should have done so. That troops from Knoxville arrested the plaintiff, is certain. At any rate, Ashby's Cavalry did it, whether starting from Knoxville in the pursuit, or from some other point. No word of communication is shown between defendants below, and this cavalry, or any one who had command of it; and for aught that appears from this record, Captain Ashby and his cavalry had never been heard of by Nance and Mitchell, till after the capture of the plaintiff, Haney.

While there is nothing in the proof that shows that Mitchell and Nance had anything to do with the arrest of Haney, there is enough for us to see that the probabilities are that information was communicated to rebel officers in command at Knoxville, by other persons with whom Nance and Mitchell had no connection whatever.

The proof shows that rebel scouts were all over the country, and many citizens acted as spies for the rebels.

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Is it probable that scouts or spies would have failed to see and report the movements of a body of men that had grown in a day or two to between five and six hundred, who had captured two prisoners and a large lot of guns at Blain's Cross Roads? We think not.

At any rate, whoever had given the information, it is certain that nothing in this record shows that Nance and Mitchell had anything to do with it farther than to make a fruitless trip to Strawberry Plains, at the request of a distressed father. That it was fruitless, is proven by plaintiff himself, by bringing out the statements of the parties themselves, in examination of his witnesses.

We can safely say in this case, that there not only is a great preponderance of testimony against the verdict, but that there is absolutely no evidence in the record that supports it. It is evidently the result of passion or of prejudice, and can not be permitted to stand.

There are several other questions that might be discussed in this case, such as the charge of the Court on the subject of a conspiracy, which, to say the least of it, had no application to the case as made in the pleadings, and was well calculated to mislead the jury. And the question as to whether the parties, under the circumstances, having organized into companies, with a commander of the whole band, commencing hostilities themselves, by capturing soldiers of one of the belligerent parties in the war then going on; capturing arms at another place, and all this within the rebel lines, while the war was being actively carried on; we say it is a question of serious doubt, whether such parties are

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not estopped from claiming exemption from one of the ordinary incidents that befall men who engage in hostilities, that of being captured, and held as prisoners of war, and being compelled, since they assume the soldier's prerogative to capture military stores, and make prisoners, to submit to being captured themselves in turn, and have to suffer without civil remedy, the annoyances and inconveniences, and even insults of prison life.

We forbear, however, to express any definite opinion on these questions in the present aspect of the case.

We hold the verdict of the jury is not supported by the evidence, and that his Honor erred in not granting a new trial.

Let the case be reversed and remanded for a new trial.

WILLIAM GIRDNER, in error, v. A. W. WALKER.

1. EVIDENCE. *Irrelevant. Error.* A witness in an action of trespass for molesting the plaintiff, an Union man, was allowed to prove that the object of the "Southern Greys," an organization with which the defendant was not connected, by the proof, was to arrest Union men, and bring them in and make them take the Southern oath ;" Held error, being irrelevant to the issue, and being the conclusion of the witness, not a statement of the facts.
2. SAME. *Incompetent.* Evidence of what a member of the "Southern Greys" said to the plaintiff, held incompetent evidence, there being

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in the facts, nothing to connect defendant with the "Greys," or with the particular member.

3. SAME. *Secondary. Grounds for.* To allow the introduction of secondary evidence of a letter, it is not sufficient to show that the writing was last in the possession of a person deceased, without some proof of inquiry for it from his family, or personal representative, or other person likely to have custody of his papers.
4. SAME. *Contents of writing.* Proof that letters "*counselled* an arrest," is not admissible, as being the conclusion of the witness, not the contents of the letter.

FROM GREENE.

From the Circuit Court of Greene County, E. E. GILLENWATERS, J., presiding.

McFARLAND & McKEE, for plaintiff in error.

INGERSOLL, for defendant.

TURNEY, J., delivered the opinion of the Court.

There is error in this record. The defendant in error instituted his action of trespass against the plaintiff in error and one Charles Cook, in the Circuit Court of Greene County, for ten thousand dollars.

The declaration substantially avers, that the defendants, with others, entered the premises of the defendant in error, with the purpose of assaulting him and carrying him from his premises and home, and by unlawful combination, and with menace and threats, drove, and caused him to leave and remain from his home, and to conceal himself, to save himself from being maimed and murdered; also, that the defendant did at divers times in the years 1861 and 1862, counsel and

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advise "rebels" to take the lives and property of their enemies, the Union men, *etc.*, to break them up, take and destroy, or drive out of the country, all men opposed to the "so-called Confederate States of America," *etc.*; that said defendants, at divers times, wrote letters to the Confederate authorities at Knoxville, counseling, requesting and urging said authorities to arrest and confine the plaintiff, *etc.*, thereby causing the arrest and false imprisonment of the plaintiff; to which there is a plea of "not guilty." Verdict of acquittal, as to Cook; verdict and judgment against plaintiff in error, for \$3,000, from which he appeals to this Court.

The facts upon which the action is based, are: In September, 1861, there were two companies in existence, the one a Union, and the other a "rebel" company; these companies drilled every Saturday in September. In the neighborhood of the rebel company there was what is called in the evidence, "The Bushwhacking fight." This fight produced considerable excitement in the neighborhood, and especially with the Union company, of which defendant in error was Captain, or at least a leading spirit. Some time after the fight, the defendant in error voluntarily went to the picket line of a regular rebel company, commanded by Captain Rumbough, was taken by a soldier on picket, and carried to the Captain, at his headquarters, about one hundred and fifty yards from the house of the plaintiff in error, Girdner.

While there, plaintiff in error went into the room where he was with Rumbough, and in the language of the witness, who is the defendant in error, "abused me

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with all the epithets possible, said I'd be hung with a grape vine, I'd shed Southern blood."

"He asked me why I went around Cedar Creek to get information—why I didn't come here; he accused me of being in the "Bushwhacking fight." This is the only time the proof shows any demonstration of unkind feeling upon the part of plaintiff in error to defendant in error.

Defendant in error proves that he left his home on account of one Joseph Holt; that Holt and plaintiff in error belonged to the rebel company called the "Southern Greys."

Under this statement of facts, the witness is permitted, against the objection of the plaintiff in error, to state "that the object of the 'Southern Greys' was to arrest Union men and bring them in and make them take the Southern oath." This testimony should have been rejected for two reasons: 1st, It is not pertinent to the averments of the declaration; 2nd, It is a conclusion of the witness.

The defendant in error further proves that Rumbough kept him until 12 o'clock the next day, and sent him to Greeneville. He was kept there one night, and the next day released by Gen. Zollicoffer.

Six or eight days after his return home, he was arrested by the Marshal and taken to Knoxville, kept there five or six days and released. Over the objection of plaintiff in error, witness proved that, after his return home, Joseph Holt came to him and said, "I understand you have been harboring Dave Fry." (Fry was re-

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ported to have burned the bridges.) "I called him a liar and made at him, and he got away." "He left, swearing he'd have me arrested. He belonged to the Southern Greys."

This evidence was admitted upon the assumption of a conspiracy upon the part of the members of the company, "The Southern Greys," to arrest, assault, maltreat or drive from his home, the plaintiff below. This was error. The proof does not justify the assumption. The defendant in error was arrested in the first instance, not by the "Southern Greys," but by Capt. Rumbough's command of cavalry, and in the second instance, by the Marshal.

The plaintiff in error is shown to have done nothing, except in the use of the language ascribed to him at Rumbough's quarters. After this, he is not known to any part of the record to the disturbance of the defendant in error. He was examined, and states positively that he was not a member of the "Southern Greys," and it is in proof that he protected Union men.

A conspiracy is a combination of men for an evil purpose; an agreement between two or more persons to commit some crime in concert; an agreement for the purpose of wrongfully prejudicing another or to pervert public justice. It may be established by positive or circumstantial evidence, and must most generally be made to appear by circumstances, rather than by direct proof, on account of the motive and purpose of the associations.

But in this case, we have neither positive nor circumstantial proof of conspiracy on the part of the plaintiff in error, nor in fact of the company, "The Southern

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Greys," to do any of the acts necessary to the offense. There is nothing to connect him with, or to bring to him a knowledge of, the declaration of Holt.

His Honor should have rejected this testimony when offered, or if he admitted it under the belief that evidence showing a conspiracy would be afterwards introduced, on discovering the failure to introduce such testimony he should have withdrawn it.

Defendant in error was permitted to prove, plaintiff in error objecting, that while at Knoxville, he saw some letters counselling his arrest. Gen. Caswell, of the Confederate army, had them and refused to deliver them to him. The letters were written, one by Reuben Davis and one by plaintiff in error, and addressed to Caswell.

This was error, because it gives the conclusion of the witness as to the contents of the letters and not the contents; because the state of facts at the time did not warrant the proof of Davis' letter; because the absence of the letters, is not accounted for and because it is not the best evidence.

In the discussion of the competency of the contents of letters, 1 Starkie on Ev., 149, mar., 164, says, "The contents of every written paper are, according to the ordinary and well established rules of evidence, to be proved by the paper itself and by that alone, if the paper be in existence. * * * One of the reasons for the rule requiring the production of the written instrument is, in order that the Court may be possessed of the whole."

If the course proposed in this case be pursued, "the

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Court may never be in possession of the whole, though it may happen that the whole, if produced, may have an effect very different from that which might be produced by a statement of part."

The rule, as here stated, is subject to the modification, that if the letter or other instrument be lost, parol proof of its contents is admissible. It devolves upon the party offering the evidence, to account for the loss of the instrument. It is shown in this case, that Gen. Caswell is dead; this fact requires less strictness of proof by the defendant in error of the loss or destruction of the letter of the plaintiff in error to Gen. Caswell, still it was incumbent upon him to have inquired of the personal representative or widow of Caswell, or of the person likely to have custody of his papers, if to be found, and to have search made amongst said papers for the letter.

Judgment reversed and cause remanded.

C. G. Lyons, A. S. Lyons and John K. Lyons v. Wilson Wattenbarger.

C. G. LYONS, A. S. LYONS and JOHN K. LYONS, in error,
v. WILSON WATTENBARGER.

EVIDENCE. In a suit against members of a military organization—what was said in the absence of defendants by others, as to the designs of the Company, while engaged in enlisting men for it, and declarations as to the acts complained of, are not admissible against the defendants.

FROM HAWKINS.

From the Circuit Court of Hawkins County, E. E. GILLENWATERS, J., presiding.

JAMES T. SHIELDS, for plaintiffs in error.

R. MCFARLAND, for defendant in error.

NELSON, J., having been of counsel, did not sit in this case.

DEADERICK, J., delivered the opinion of the Court.

This is an action of trespass, instituted in July, 1865, in the Circuit Court of Hawkins County, against the plaintiffs in error, and eight or ten other defendants.

Verdict and judgment were rendered in favor of the plaintiff below, against all the defendants, except two, none of whom appealed in error to this Court, except the three above named.

Numerous questions have been made here upon the pleading and evidence admitted and rejected, but we do

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not deem it necessary in the view we have taken of the case, to notice them all, as there are errors in the action of the Court, in the admission of evidence, for which we feel constrained to reverse the cause.

Upon the trial of the cause, Samuel Henderson was allowed to state to the jury that William Palmer, who is no party to the suit, came to him and his son, in the field, the day before Phipps' company was organized, and had a paper in his hand, and was enlisting men for the company. Palmer said the company was to organize and operate between Nashville and Cumberland Gap, and they were to be a guerilla company, and get their pay off the Union men. Henderson further stated he frequently saw the company pass the road, and saw some of the company with leather, bacon, *etc.*, which they said they had got at plaintiff's, and none of the defendants were present at the time.

This testimony was objected to by the defendants, but the objection was overruled, and the testimony was allowed to go to the jury.

The admission of this testimony was clearly erroneous.

Nor is this error in any degree cured by his Honor's charge, wherein he says to the jury, that "the declarations of William Palmer and others made before the company of Phipps was formed" cannot be looked to as evidence against the defendants, if made in their absence and without their knowledge, unless the said Palmer or others referred to were then engaged in the business of enlisting men for Phipps' company, or was by means of their position and business, authorized to speak for the same, *etc.*

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The witness Henderson, had stated that Palmer was enlisting men for 'Phipps' company, so that the contingency was proved, the existence of which, according to the charge, made the declarations of Palmer admissible as evidence against defendants, although made in their absence.

But according to the charge, there was another contingency in which Palmer's declarations in the absence of defendants, would be evidence against them. And that was, if Palmer and others, by means of their position and business, were authorized to speak for them. How the jury were to determine whether the position and business of Palmer and others authorized them to speak for defendants, is not defined in the charge.

In our view of the case, this proof was improperly admitted, and was calculated to excite prejudice against the defendants in the minds of the jury.

Other declarations of William Palmer, made in the absence of defendants, as detailed by David Carey, are liable to the same objections.

Carey is allowed to detail a conversation with William Palmer, in the absence of all the defendants, in which Palmer stated that they had some fine property which they had brought from Wattenbarger's, and wanted witness to go with him and buy some of it at the public sale of it, to be made upon the day of the conversation.

For the error of the Court in admitting this testimony, the judgment must be reversed, and the case remanded for a new trial.

Pleasant Starnes v. James Hubbs.

PLEASANT STARNES, in error, v. JAMES HUBBS, in error.

EVIDENCE. *Political opinions not relevant.* In trespass for taking a horse, the political opinions of the parties is not in issue, and proof that one was a rebel and the other "Union," is not relevant.

FROM GRAINGER.

From the Circuit Court of Grainger County. J. P. SWANN, J., presiding.

J. R. COCKE, for plaintiff in error.

THORNBURG & MCFARLAND, for defendant.

TURNEY, J., delivered the opinion of the Court.

There is error in the record. This suit was commenced before a Justice of the Peace for Grainger County, by the plaintiff in error, against the defendant in error, for forcibly taking and converting to his use a bay mare mule, the property of the plaintiff. There was an appeal from the judgment of the magistrate to the Circuit Court, when there were verdict and judgment for the defendant, and an appeal to this Court.

There is only one question raised by the record, necessary to be noticed. On the trial in the Circuit Court, the defendant was permitted to prove, over the objection of the plaintiff, "that plaintiff was a rebel, and had aided and abetted in the rebellion; that plaintiff was always considered a rebel, and Confederate sol-

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diers frequently stopped at his house to feed," &c., and that defendant was a Union man. This was error.* The political faith of a party has no pertinence to the issue, more than have his peculiar views upon religion. This fact is incapable of affording any reasonable presumption or inference as to the principal fact or matter in dispute, and tended to draw away the minds of the jury, and mislead them.

Judgment reversed and remanded.

JOSEPH H. SMITH, in error, v. SAMUEL E. COTTRELL,
Assignee, etc.

EVIDENCE. *Political status. Duress.* Where the question of duress is involved in a transaction during the war, the political status of the parties is relevant, and proper to be proved.

FROM CLAIBORNE.

Debt, from the Circuit Court of Claiborne County.
J. P. SWANN, J., presiding.

Smith, the plaintiff in error, bought corn of the defendant, and agreed to pay him in bank notes. Afterwards, he paid him in Confederate Treasury notes. Cottrell, the defendant in error, sued the plaintiff in error,

* See *Smith v. Cottrell*, *infra*; *Smith v. Brazelton*, *ante* p. 44; *Ellis v. Spurgin*, *ante* p. 74; *Hart v. Reynolds*, *post* p. 208; *Swaggerty v. Caton*, *post* p. 199.

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for the price of his corn, and insisted that he had been compelled by duress to accept the Confederate currency. He proved that Smith was a rebel, the testimony being objected to.

JAMES T. SHIELDS, for plaintiff in error.

W. R. EVANS, for defendant.

NICHOLSON, C. J., delivered the opinion of the Court.

Most of the causes of error relied on by the plaintiff in error, are answered by the fact that the bill of exceptions does not show that it contains all the evidence in the case.

The objection to the proof that plaintiff in error was a rebel, was properly overruled. Whilst such evidence, in general would be irrelevant, and calculated to prejudice a jury, yet in this case, it was a circumstance that might well be looked to, in determining whether defendant in error received the Confederate money under duress.

There is no error in the record; let the judgment be affirmed.

James Swaggerty *et al.* v. Thomas Caton.

JAMES SWAGGERTY *et al.*, in error, v. THOMAS CATON

1. EVIDENCE. *Political opinions. How proved.* Where evidence of political opinions is admissible, it must be proved as a fact, not as character, by reputation, or more improperly, by the mere judgment of the witness, or by showing "that he bore the name of a rebel," or that he was influential with rebels.
2. SAME. *Res gestæ. Rebutting.* Declarations of the plaintiff in error before a Lieutenant of the Confederate army being admitted, evidence of what the Lieutenant said, at the same time, is admissible as part of the *res gestæ*, or to rebut what the plaintiff in error said.
3. TRESPASS. *Act of omission.* A charge, that the mere omission of a defendant to interfere for the discharge of a prisoner before a Confederate military officer, is a circumstance which may be looked to with the other facts of the case, to determine the guilt of the defendant of the trespass, is error.
4. PRACTICE. *Repetition of charge.* For a court to repeat several times, on the return of a jury into court to report that they can not agree, disjointed parts of his charge, is error.*

FROM COCKE.

From the Circuit Court of Cocke County.

BARTON & MCKEE, THORNBURG & MCFARLAND
for plaintiff in error.

E. C. CAMP, for defendant.

TURNEY, J., delivered the opinion of the Court.

The judgment of the Circuit Court must be reversed,
for error in the admission of incompetent testimony,

*See *Defrese v. The State*, post.

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and for the improper submission of the charge of the Court to the jury. An action of trespass was prosecuted in the Circuit Court of Cocke County, by the defendant in error, against the plaintiffs in error, and others, not before this Court, for the arrest and imprisonment of the defendant in error. Verdict and judgment for defendant in error, and an appeal to this Court.

On the trial, the defendant in error was permitted to prove, (plaintiffs in error objecting,) that "John Murrell" (one of the defendants below) "bore the name of a rebel." Allowing for the purposes of this opinion, that it was strictly legitimate to have proven the political status, opinions or sympathies of the defendant, the mode adopted and insisted upon in the Circuit Court, was not the correct one. By it is shown no act, or fact from which a jury may or can legitimately infer any thing. Its submission to the jury, is nothing more nor less, than giving to them the conclusions, or it may be, the mere speculations, of a party or parties, without reference to the question whether they are based upon the conduct of the defendant, or the imagination of the witness. If it is relied upon as proof of character, supposing such testimony to be competent, it has no one constituent of the rule governing the introduction of testimony upon that subject. But in no case can such fact be shown by character, it must be proven as a fact, or such acts of the party as make up the fact, must be submitted to the jury. In other words, it must appear, from positive or circumstantial testimony, and not from speculation or rumor.

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The defendant in error was also permitted to prove that McSween, one of the defendants below, "was influential with the rebels." This error is met by the same objection as the first.

The defendant in error was permitted to prove the declaration of the plaintiff in error, made at the time of, and during the trial of the defendant in error, before one Mims, a Confederate Lieutenant. The plaintiff in error proposed to prove the declaration of Mims, made at the same time, assigning reasons why he would not, or did not release the defendant in error. Such declarations, if made, were part of the *res gestæ*, and competent, or if not parts of the *res gestæ*, and therefore incompetent, they were competent as rebutting the effect of the declarations of the plaintiffs in error, made at the same time, and introduced by the defendant in error.

His Honor, the Circuit Judge, in his charge, said to the jury, "The mere omission on the part of the defendants, Smith and McSween, to use their influence to effect the release of the plaintiffs, is a circumstance, if shown in proof, which may be looked to in connection with the other proof in the cause, in order to determine whether they are guilty, or not guilty, of the trespass complained of. This was clearly error. We know of no rule requiring one to use his influence to release from arrest, a person in custody of those acting under color of authority. Mims was an officer in the Confederate army, and as such, held in arrest the plaintiff in error, whether rightfully or wrongfully, it is unnecessary for us here to enquire. He was acting in a military capacity, and was the representative of a government *de facto*. Besides, it

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would be a strange and unnatural rule, to require third persons to interfere, at the risk of arrest and imprisonment to themselves, for the release of another. Such rule has no warrant in law, and is contrary to the paramount principle of self-protection.

After his Honor had charged the jury, they retired to consider of their verdict, and in a short time returned into Court, and said they could not agree, and were asked by the Court "if they disagreed as to any portion of the charge, or the testimony of the witnesses." "They replied that they did not know that they did." Thereupon, the Court repeated a portion of the charge; the jury returned a second time, and said they could not agree, and the Court, without being called upon, again repeated portions of his charge. It is well enough, when a jury asks for a particular part of a charge upon an indicated subject, for the Court to repeat that part substantially as given. But when a jury merely disagrees as to the result, after weighing the testimony and considering the charge, it is error in the Court to repeat or re-charge disjointed portions of his charge; in such instance, a jury very well may, and we think always will conclude, that the Court means to have them understand that the matter or question, thus disjointedly charged upon, is controlling in the case, and will find accordingly.

Judgment reversed, and cause remanded.

Jesse Moore v. John Burchfield.

JESSE MOORE, in error, v. JOHN BURCHFIELD.

DAMAGES. *Excessive. New trial for.* In trespass against a conscript officer, when the facts were, an attempt to arrest the defendant in error as a "conscript," an effort by him to escape; a pursuit, in which he was shot at but not hit, and run over by a horse, but not seriously hurt; a capture and detention of from three to five hours; some verbal abuse by one of the parties, repressed by plaintiff in error, after which he escaped, no malice being shown; a verdict for \$8,000 damages was held excessive, and new trial granted.

FROM JEFFERSON.

Appeal from the Circuit Court of Jefferson County.
J. P. SWANN, J., presiding.

R. M. BARTON, for plaintiff in error.

L. A. GRATZ, for defendant.

FREEMAN, J., delivered the opinion of the Court.

This is an action of trespass, commenced by Burchfield, defendant in error, on the 10th of August, 1865, against complainant in error, and one Taylor, in the Circuit Court of Jefferson County.

The case was tried at April Term, 1867, by a jury under the charge of the Court. Taylor was found not guilty; but a verdict of guilty was returned as to Moore, and the damages assessed at \$8,000; upon which judgment was rendered by the Court. A new trial was moved for by Moore, which was overruled by the

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Court, and an appeal in the nature of a writ of error taken by him to this Court.

A reversal of this judgment is asked by plaintiff in error, on the ground that the damages are excessive. The well-settled and long-established rule, not only of this Court, but of the courts of the other States of this Union, as well as those of England, is, that a verdict of a jury in cases of pure *tort*, such as this, will not be disturbed or set aside, except "where the amount of damages is so flagrantly outrageous and extravagant as necessarily to evince intemperance, passion, partiality or corruption on the part of the jury." 5 Cowen, 120; *Boyers v. Pratt*, 1 Hum., 90; *McConnell v. Hampton*, 12 J. R., 236.

Let us examine the testimony in this case, and see if this verdict can be allowed to stand, under a sound application of the rule to the facts of the case.

The declaration alleges in substance, that "the defendant, on the — day of May, 1863, with force and arms, did beat, bruise, wound and ill-treat the plaintiff, and arrested him, without any authority of law whatever, and then and there imprisoned and detained him in prison there, without any reasonable or probable cause whatever, for the space of six months," &c.

It seems from the proof, that complainant in error was an enrolling officer, or acting under the Confederate conscript law, as conscript officer, and as such sent one Sartain and others of his party, out in search of parties subject to conscription. In pursuance of this purpose, they arrested plaintiff Burchfield. When the parties approached him he fled and was fired at, but not struck;

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was pursued, and, the witness says, run over by a horse of some of the party, whether accidentally or on purpose he does not know. He seems not to have been seriously hurt, however. When he was arrested, Campbell, one of the party arresting him, cursed and abused him, about the time he was brought to where Moore was; but when Moore heard it, he "interfered," in the language of witness, "and made him hush." He was started off under charge of a squad, to Dandridge; but on the way they stopped at a house to procure something to eat, and Burchfield escaped, and was never arrested again. He was only under arrest, it seems, a few hours; perhaps not more than from three to five hours, if so long; certainly not longer than the evening of the day of his arrest.

This is the substance of the testimony as to the facts of the arrest. It is not shown that Moore, or any of the party, had any ill feelings towards Burchfield, or that they sought to arrest him more than others, subject, as they believed, to conscription.

Upon this statement of facts, can it be said that a judgment for \$8,000 damages was the deliberate judgment of an impartial and dispassionate jury? Will not every man who hears this verdict, at once feel that there were other elements mingled in the investigation and determination of this case, that led to the finding of this sum as their verdict by the jury, more controlling than the simple facts of the case? Would not every impartial man at once, on hearing of the amount of this verdict, say that it must have been the result of passion, intemperance or partiality? and

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that such a sum was extravagant and outrageous, as damages, to be recovered by one neighbor from another, for an injury that did not seriously affect his life or limb, and but at most only gave serious annoyance and disquiet for a few hours, and inflicted only very slight hurt to his person, not enough to prevent his carrying two guns, and making his escape in safety from his captors? We think no sober, thinking man, could fail to come to the conclusion we have indicated.

We admit the full force of the argument drawn from the peculiar circumstances of the times in which this arrest was made, and that an arrest in such times was calculated to create the most serious apprehensions on part of a party arrested, whether such arrest was by the military authorities of the one party or the other. But then it must be remembered that all were alike involved in the annoyances and troubles that grew out of our late civil strife, and that defendant in error can not claim that he was made an exception, or singled out from other citizens as a peculiar mark for any private vengeance or hate; for it seems that Moore was engaged in conscripting generally, as an officer of the army, to which he belonged, and so far as we can see, acted, as he believed, in the discharge of a duty imposed upon him by reason of his being an officer and a soldier, whose business it is to obey the orders of his superior officer, without question, in most, if not in all cases.

That the damages in this case are far more than would have been given if the trespass had been committed before the passions of our people had been aroused by our late unfortunate civil strife, all will at once admit. This

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shows at once that passions and prejudices that have thus been kindled, certainly were that additional element, added to the evidence before the jury, which produced this enormous, and in our judgment, most extravagant verdict.

It has been well said by Chief Justice Best, on the subject of jury trials, that "it is one of the most beautiful parts of our Constitution, that when anything occurs in one tribunal which appears to be wrong, it may be afterwards corrected by another, so that the interests of a party cannot be prejudiced by a hasty decision; otherwise, the trial by jury, instead of being a blessing, would become a source of evil."

We feel it to be our duty in this case to give the party a new trial, when his case may be submitted to another jury, and a calm, impartial and dispassionate investigation be had, in which a verdict may be rendered more in accord with the real damages sustained, taken in connection with all the circumstances of aggravation that may be presented by the evidence, if any there be, than the one now under consideration.

There are several other questions of interest presented in the record, but as the authorities are not at hand to which we are referred, so as to enable us fully to investigate them, we content ourselves by deciding the one question of excessive damages allowed by the jury.

Let the case be reversed, and cause remanded for new trial.

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EMELINE HART v. WILLIAM S. REYNOLDS *et al.*

1. PLEADING. *Notice of Defense.* Notice of special matters of defense under the Code, 2913-2917, should be as certain as a special plea under § 2916. Notice of a justification in trespass for seizing property, is defective if it does not specify the property taken, or so describe the authority under which the defendant acted, as to inform the plaintiff of the real nature of the defense.
2. EVIDENCE. *Political status.* It is error to permit a defendant to prove the "disloyalty" of the plaintiff in a civil action, for trespass in taking goods.*
3. SAME. *Same. How proved.* If the political status of a party is to be proved, it must be done by acts and declarations, not by hearsay or reputation.
4. ABANDONED PROPERTY. *Seizure of.* Under the Act of Congress, approved March 12, 1863, authorizing the Secretary of the Treasury to appoint agents to collect abandoned property, the right to receive and collect abandoned property does not depend upon the "loyalty" or "disloyalty" of the owner. That became a question only upon application to the government to restore the proceeds.
5. SAME. *What is.* Property was not subject to seizure as abandoned, unless the owner was engaged in rebellion, either in arms or otherwise, or gave aid and comfort to those so engaged.
6. SAME. *Same.* Property left in the care of another person, under a colorable sale, by one publicly residing in an adjoining county, visiting the place where the property was, and not in arms, or encouraging the rebellion, is not abandoned.
7. SAME. *Sale not, though fraudulent.* The sale for the purpose of preventing the Government from seizing property is not an "abandonment."
8. SAME. *Seizure. Justification.* A person seizing property as agent of the Government, could not justify under proof of probable cause to suspect that it was abandoned.
9. CONSTRUCTION. *Subsequent Statute may affect.* A subsequent statute may be looked to in ascertaining the meaning of terms used in a former one, even in their application to acts happening between the dates of the statutes.

FROM CAMPBELL.

Trespass in the Circuit Court of Campbell County.
L. C. HOUK, J., presiding.

* *Swaggerty v. Caton, ante p. 199.*

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E. C. CAMP for the plaintiff, submitted a printed argument, referred to in the opinion.

He insisted that the notices of defense were insufficient. The notices read as follows: 1st. "He did not take the several articles of personal property mentioned in the declaration of said plaintiff." 2d. "That whatever articles he did take were taken into his possession by authority duly vested in him as the Special Assistant Agent of the Treasury Department of the United States, and to and for the use of the United States." Code §§ 2913 to 2917, 1 Chit. Pl., 473, (note;) 13 Johns, 436-475; 1 Doug. (Mich.) 306; 6 Mich., 508; 8 Mich., 351; Caruthers' Hist. of Law Suit, 135; Tidd's Pr., 688; *Parks v. Holmes*, 22d Ill., 528; *Sherman v. Dutch*, 16 Ill., 285; *Dayton v. Fery*, 29 Ills., 526; Coke Litt., 283; 3 Mod., 137; 1 Salk, 107, and 1 Saunders' Rep., 298; *Cochran and Thompson v. Tucker*, 3 Cold., 186.

There is error in admitting the testimony of Horace Maynard. This witness is permitted to depose to the *effect*, merely, of certain conversations had with the Secretary of the Treasury, which was, "that the Secretary acknowledged Wm. G. Brownlow as the recognized Agent of the Treasury Department." This is a plain violation of the rules of evidence.

Permitting witnesses to state "the reputation of the plaintiff for loyalty or disloyalty," is error.

In an action of trespass, if the defendant hath matter of justification, he must plead it specially, and can not give it in evidence under the 'general issue.' *Meeds v. Curver*, 7 Iredell, 273; *Harris v. Miner*, 28 Ill.,

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143; Law Suit, 129; 1 Chit. Pl., 551, 556; Stephen. Pl., 2d ed., 198; *Jones v. Brown*, 1 Bing., (N. C.) 484.

The charge of the Court as to what constitutes "abandoned property" is erroneous, in this, that it does not charge that the absence of the owner must be voluntary. 1 Bouvier Law Dict., 14; Jacob Law Dict.; Worcester's Dict.

He contended at length that the Act was unconstitutional.

The Act of Congress contemplates a judicial forum, which shall pass upon the facts necessary to be found, in order to subject the property to confiscation. See Acts of March 2, 1799; July 13, 1861; May 20, 1862, by which the property was to be seized, condemned and sold, under proceedings instituted and had in the United States Court within the district where the property was taken. So of the Act of July 17, 1862. See *Galbraith v. McFarland*, 3 Cold., 267.

In summary proceedings, the record should show on its face every fact necessary. Peck, 414; 3 Hum., 313; 5 Hum., 425; 9 Yerg., 264. These facts must be shown by the party who claims title under such summary proceedings. Cooke, 365; 9 Cranch, 64. Modes of proceeding in derogation of the common law are not to be extended, by construction, beyond the cases specified by the statute. 4 Yerg., 155; 2 Hum., 13; 3 Hum., 415; 4 Hum., 57 and 505; *Thatcher v. Powell*, 6 Wheaton, 119; 9 How., 336; *McCleary v. McClain*, 2 Ohio State R., 378; *Gilliand v. Sellers*, 2 *Id.*, 223.

Forfeitures are odious to the law, and never favored. *Farewell v. Chaffry*, 1 Burr. Rep., 54, and cases there cited; also, *Smith v. Page*, 2 Salk., 644; *Smith v. Whit-*

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beck et al., 13 Ohio State R., 477; 2 Bl., 341; 4 Bl., 304, 308; 1 Ch., R., 745; 1 Saund. R., 362.

L. A. GRATZ, for defendant.

NELSON, J., delivered the opinion of the Court.

This is an action of *tort*, brought by the plaintiff against the ten defendants named in the record, under the Code, § 2746, for the wrongful taking of one bureau, one press, one bedstead, one trunk, one side-saddle, and various other articles of personal property. The declaration was filed in accordance with form No. 18, § 2939. The defendants severally pleaded not guilty; and the defendant, William S. Reynolds, in addition to the plea of not guilty, gave notice "to the plaintiff's attorney," that, on trial, he would insist:

1st. That he did not take the several articles of personal property mentioned in the declaration; and

2d. That whatever articles he did take, were taken into his possession by authority duly vested in him, as the special Assistant Agent of the Treasury Department of the United States, and to and for the use of the Government of the United States.

It appears from the record that, at April Term, 1867, a demurrer was sustained to the plea and notice of William S. Reynolds, and leave granted to amend and to plead over; but no demurrer is set out. At the August Term, 1870, the plaintiff moved that the said notice of defense attached to the plea of William S. Reynolds should be stricken out as insufficient, but the Court overruled the motion.

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It appears, in evidence, that the plaintiff was the owner of the property mentioned in the declaration; that she resided in Anderson County before and until the month of September, 1863; that, in consequence of threats made against her, and "some people cutting her house partly down," on the previous night, she removed about twenty miles distant, to Campbell County; that she did not remove secretly, but "told any one that asked her where she was going;" that she resided openly and publicly in the county to which she removed, and occasionally visited her former residence; that, before she changed her domicile, she made what the witnesses call "a sham sale" of the property sued for, to one James Hale, for the purpose of preventing her property from being taken or destroyed, but with the understanding that she was to have it back whenever she returned, and that Hale was to keep it for her until she wanted it. Hale, who was examined as a witness for the defendant, states that he did not claim the property at any time; that he never paid anything, and that plaintiff returned the note that he executed for the property.

It further appears, that the plaintiff never took up arms against the United States; but there is some conflict in the testimony as to her political opinions. One witness states that the plaintiff had the reputation of being "disloyal;" another, that she was a "rebel by report," that he saw her shout and clap her hands when Wheeler's raid passed along in August, 1864, but did not know "what she clapped and shouted for." On the contrary, three witnesses, one of whom lived with the plaintiff, state they are well acquainted with her,

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and never knew her to do any act giving aid, comfort or encouragement, to the rebellion.

It further appears, that the defendant, Wm. S. Reynolds, claiming to have authority from the Agency Aid at Knoxville, Tennessee, of the the United States Treasury Department, to take possession of all abandoned rebel property in Anderson County, seized the property in controversy, and sold it at public sale, about the month of June, 1864; that he and one Keslin, conducted the sale; that his co-defendants became purchasers of the property; and that, on the day of sale, and before its removal, the plaintiff appeared in person and forbade the purchasers to remove the property, and stated that they would have to account for the property, or the value of it, "some day," and some of the purchasers, who are not sued, declined, in consequence, to remove the articles they bought at the sale. It is also stated by one witness, who is not contradicted, that when the plaintiff appeared on the day of sale, and claimed the property, she "asked the defendant, Reynolds, for his authority for selling her property, and Reynolds told her he would see her in hell before he would show her any authority, or any other rebel."

These are the most material facts appearing in the record. Verdict and judgment were rendered for the defendants, and the plaintiff appealed in error to this Court. Various questions of law are presented by the record and in argument.

1. It is provided in the Code, §§ 2913-2917, that the defendant may enter a general denial of the plaintiff's cause of action, equivalent to the general issue

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heretofore in use; that when such general plea is filed, he shall give notice of all his real defenses, whether by way of denial or avoidance, though such defense might have been admissible heretofore, under the general issue; that no matter of defense, of which notice is not given, shall be relied on; that the notice shall state such defenses separately; and if the same are not stated clearly, or are double or insufficient, they may be struck out on motion; or he may plead specially his defenses, in which case he shall state the facts relied on, truly and briefly as may be, and no matter of defense not pleaded, shall be shown in evidence.

In the case of *West v. Tylor*, 2 Cold., 101, it was held by this Court, that a notice of special matters of defense "should be as certain, sufficient and effective, for all purposes, as the special plea provided by § 2916." Under the English statutes of set-off, which allowed notice of cross demands, it was held that the notice should be almost as certain as a declaration; 1 Chit. Pl., 575, marg; 1 Selw. N. P., 136, note 102, 4th Am. ed. A similar practice prevailed under our statute of set-off of 1756, c. 4, s. 7, Car. & Nich. And in this case, we are of opinion that the matter of justification relied upon in the notice, is defectively stated, in this, that it does not aver what articles were taken by the defendant, or so describe the authority under which he acted, as to inform the plaintiff of the real nature of the defense; and it was error in the Court below, to overrule the motion to strike out the notice for insufficiency.

2. The Court erred in permitting witnesses to prove

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the so-called "disloyalty" of the plaintiff, by reputation, the evidence having been objected to when offered. It has long been well settled that the hearsay evidence of reputation is admissible only in questions of boundary, pedigree, and the like, and that in civil suits, evidence as to general character is not admitted, unless the nature of the action involves the general character of the party, or goes directly to affect it. 1 Greenl. Ev., 54. If the plaintiff had any political status, and it was necessary to inquire into it, with a view to the attempted justification, it should have been proved, not by hearsay or general reputation, but by her acts or declarations.

3d. On the supposition that the evidence was sufficient to establish the fact that William S. Reynolds was an assistant special agent of the Treasury Department, which is not by any means clear, as it rests, in part upon the hearsay evidence of a declaration made by the Secretary of the Treasury, we hold that his Honor, the Circuit Judge, erred in his instructions to the jury, as to what constituted abandoned rebel property. In section 1 of the Act of Congress, approved March 12, 1863, 12 U. S. Statutes at Large, 820, c. 120, the Secretary of the Treasury was authorized to appoint "a special agent or agents to receive and collect all abandoned or captured rebel property in any State or Territory of the United States, designated as in insurrection against the lawful Government of the United States, by the proclamation of the President, of July 1st, 1862," with certain exceptions as to property used, or intended to be used for the purpose of waging or carrying on war. Section 2 authorizes

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the property seized or collected by the agents to be appropriated to public use, on due appraisement and certificate, or to be forwarded to any place of sale within the loyal States, as the public interests may require. The right to receive and collect abandoned property does not, under said Act, depend upon the character or the loyalty, or disloyalty of the owner; but in section 3, it is provided that "any person claiming to have been the owner of any such abandoned or captured property, may, at any time within two years after the suppression of the rebellion, prefer his claim to the proceeds thereof, in the Court of Claims, and on proof to the satisfaction of said Court of his ownership of said property, of his right to the proceeds thereof, and that he has never given any aid and comfort to the present rebellion," may receive the residue of such proceeds after "certain deductions" specified in said section.

In his circular of July 3, 1863, to the Supervising Special Agents, the Secretary of the Treasury discriminates between abandoned, captured, commercial and confiscable property, and defines the first to be of two descriptions; *First*, that which has been deserted by the owners; and *Second*, that which has been voluntarily abandoned by them to the civil or military authority of the United States. The same definition is repeated in the "Regulations" prescribed by the Secretary of the Treasury for the government of the several special agents and agency aids, appointed in pursuance of the said Act of 12th of March, 1863, and promulgated on the 11th of September, 1863, page 31, and in his Rules and Regulations concerning commercial intercourse, and abandoned, captured

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and confiscable property, page 31, promulgated July 30th, 1864. And in the second and third sections of the Act approved July 2d, 1864, it is declared that "property, real or personal, shall be regarded as abandoned when the lawful owner thereof shall be voluntarily absent therefrom, and engaged, either in arms or otherwise, in aiding or encouraging the rebellion." The said third section declares, among other things, that the Act approved March 12th, 1863, is hereby extended, so as to include the descriptions of property mentioned in the Act approved July 17, 1862, to suppress insurrection, etc. 13 U. S. Stat. at Large, 376. And, by section 7, of the said last-named Act, it is provided that the property, real and personal, which is subject to confiscation under section 6, shall be subject to condemnation and sale by proceedings to be instituted in the District Courts of the United States, "whenever the same shall be found to have belonged to a person engaged in rebellion, or who has given aid or comfort thereto.

The evidence contained in the record does not make out a case of abandonment within the meaning of either of these definitions. It does not show that the plaintiff was engaged in rebellion, either in arms or otherwise, or that she gave aid and comfort to those who were so engaged; and, although it does not clearly appear whether her property was seized and sold before or after the passage of the Act of July, 1864, yet, as the Act was passed upon the same general subject, and refers to all the previous Acts, it may be properly looked to for the purpose of ascertaining the meaning of terms employed in the prior Act. And in no pos-

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sible sense of all, or either, of said statutes, can the plaintiff be regarded as having abandoned her property, if she left it in the care of another person, resided publicly in an adjoining county, and revisited her former residence before the alleged seizure, and was not engaged in arms or otherwise, in encouraging the rebellion. The charge of the Circuit Judge, that "abandoned property, in the purview of the law of Congress, is property owned by rebels, and which they abandon, go away and leave, abscond from, and are not present to protect it or claim it as their own, this absence being in consequence of the original owner having given aid, encouragement or assistance to those engaged in arms against the United States," was founded in error, and well calculated to mislead the jury. So, also, the instructions of his Honor, that "the property can not be said to be abandoned, unless you believe it was intended that the person in whose possession the property was placed, should hold it for the purpose of defrauding the government, by avoiding the Act of Congress in regard to abandoned property," is in conflict with the principles declared in *Galbraith v. McFarland*, 3 Cold., 267, and seems, moreover, erroneously to imply that a purpose to defraud the government, is synonymous with abandonment. Again: his Honor erred in stating to the jury, that, if the property was seized and sold as abandoned property, and the circumstances under which it was left by the owner were such as to induce a reasonable, prudent man to believe it was abandoned, the plaintiff can not recover in this action." If a sheriff arrests a person not named in his writ, or

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seizes goods not belonging to the defendant in an execution, he acts at his peril, and it is no justification that he acted under a mistake. The seizure of property under the Acts of Congress referred to by an "Agency Aid," or "Assistant Special Agent" of the Treasury Department, can be justified only by the fact, and not by the supposition, of abandonment.

There are other errors, both in the proceedings and in the charge of the Circuit Court, which are not here considered, as in any event, the judgment in this case must be reversed, and a new trial awarded.

Upon the questions so elaborately and ably argued by the counsel for the plaintiff in error, as to the unconstitutionality of the Acts of Congress above referred to, and as to what constitutes aid and comfort, within their true import and meaning, it is not deemed necessary to announce an opinion. Grave doubts have been expressed upon these topics, by some of the ablest legal minds, but as they involve a wide latitude of investigation, and the exigencies of this case do not require that they shall be considered, we have preferred simply to construe so much of the statutes as seems necessary without expressing any opinion as to their constitutionality.

Let the judgment be reversed, and the cause remanded.

James Heatherly v. Andrew Bridges.

JAMES HEATHERLY v. ANDREW BRIDGES.

1. APPEAL. *Bill of Exceptions.* Where the Bill of Exceptions does not purport to contain all the evidence, no insufficiency of proof, however great, will authorize a reversal.
2. SAME. *As a Pauper. False Imprisonment, etc.* An appeal in *forma pauperis*, is allowable on behalf of a defendant against whom a judgment is rendered, for false imprisonment, malicious prosecution or slanderous words. Code construed, §§ 3133, 3192.
3. EVIDENCE. *Practice.* Admission of irrelevant matter before a jury, and its subsequent withdrawal, though not error, is strongly reprehended.
4. SAME. *Acts of Family.* Acts of the family of a defendant in Trespass, with which he is not shown to have been connected, are not admissible evidence against him.
5. SAME. *Error. Objection.* Evidence objected to may so connect itself with other evidence not objected to, as to make its admission error when it would not otherwise be so.

FROM CAMPBELL.

From the Circuit Court. L. C. HOUK, J., presiding.

BAXTER, CHAMPION & RICKS, for plaintiff in error.

L. A. GRATZ, for defendant.

SNEED, J., delivered the opinion of the Court.

This was an action of trespass, *vi et armis*, from the Circuit Court of Campbell county, for an alleged assault and battery and false imprisonment, committed by James

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Heatherly upon the person of the defendant in error, Andrew Bridges. The transaction upon which the action is based, occurred during the late civil war. The action was commenced on the 29th of September, 1865, and the cause was submitted to a jury at the August term, 1867, and resulted in a verdict and judgment against Heatherly. The bill of exceptions does not show that it contains all the testimony adduced upon the trial, nor does it contain any words which would clearly import that fact. The plaintiff below, Andrew Bridges, was arrested by a party of Confederate soldiers, and taken to "Speedwell Camp Ground," where, it seems, he was tried upon some accusation not shown in the proof, and discharged. He was retained in custody about forty-eight hours; and, according to the proof here disclosed, he was subjected to no harsh or cruel treatment. The jury awarded him a verdict for two thousand dollars, the amount he claimed as damages. We are to presume, under our rules of practice, that there was ample testimony to sustain this verdict and judgment, and we cannot, therefore, disturb it on the facts of the case.

A motion is made at the bar to dismiss the appeal, on the ground that it was taken *in forma pauperis*, and we are referred to section 3192 of the Code, which allows the bringing of suits *in forma pauperis*, except for "false imprisonment, malicious prosecution and slanderous words." This section refers to the *bringing* of the actions mentioned, which, for obvious reasons, are forbidden to be brought, unless the party plaintiff shall first give security for costs. It has no reference to the

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prosecution of an appeal by a party defendant, against whom a verdict and judgment have been rendered in either of these actions. The law is very liberal in allowing appeals *in forma pauperis*. The Code, it is true, in its terms, seems to contemplate only the institution of a suit in this form; but it provides that either party to an action at law in the Circuit Court, may, at the term at which final judgment is rendered, pray an appeal in the nature of a writ of error, to the Supreme Court; and the courts, by construction, have uniformly extended the remedy, *in forma pauperis*, to appeals, appeals in error or writs of error, and other remedial process. It is said that the prosecution of a *certiorari* by a defendant, in forcible entry and detainer, is an exception. *Norton v. Whitesides*, 5 Hum., 381. And under the Code, no *supersedeas* shall issue upon application *in forma pauperis*, without express order of the Judge, dispensing with security. Such order may be made by the Judge, only on notice to the adverse party, of the application. § 3133. We are aware of no other restrictions upon the application of this remedy; and we are of opinion that the right of a party to appeal *in forma pauperis*, from a judgment of false imprisonment, is not affected by section 3192, of the Code.

We are asked to reverse this judgment, because the damages are excessive; because, in the language of the counsel, the verdict shocks the moral sense, and demonstrates that it is the result of passion and prejudice. We can not assume that the verdict is unwarranted by the facts; for we have no assurance that the facts are all before us. We have no hesitation in pronouncing

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upon the utter insufficiency of the testimony disclosed in this record to support a verdict so extraordinary; but we dare not impute to the jury either rashness, prejudice or passion, as we are bound by the rules of law to presume that this record does not advise us of all the testimony upon which they acted; and we can not, therefore, disturb this judgment, on the ground that the damages are excessive. We are again asked to reverse the judgment and grant a new trial, upon the ground that the presiding Judge erred in permitting certain illegal evidence to go to the jury; and the counsel for the defendant in error admits, with an honorable frankness, that there was some illegal evidence thus admitted; but he insists that it was done without objection. It is true that this Court has repeatedly held that the admission of illegal evidence, without objection, can not be assigned as error. *Cooke*, 102; *Hudson v. The State*, 9 Yerg., 408; *Ewell v. The State*, 6 Yerg., 364, 374. But this rule, like many other doctrines of the law of evidence, has its exceptions and modifications. We do not suppose that evidence, simply illegal, though objected to, would justify the granting of a new trial, unless such evidence was hurtful, or likely to prove so, to the cause of the party objecting. If it were matter harmless or irrelevant, the Court would not, for this merely, set aside a verdict, even if objected to. But we take it to be a sound principle, that, if illegal matter objected to, however harmless or irrelevant of itself, when considered in connection with other illegal testimony, unobjected to, is calculated seriously to affect the interest of the party,

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then both should be considered by the Court in estimating the probable influence of the first upon the minds of the jury.

The defendant in this case, was a citizen, not a soldier. The theory of the prosecution is, that the defendant was connected with the party of Confederate soldiers who arrested the plaintiff. It seems, however, from the proof before us, that though the defendant was, about the time of the arrest, seen with the squad of soldiers, yet he was not present at the arrest—it is not shown that he counseled or procured it—nor did he accompany the squad with their prisoner to Speedwell Camp Ground. He is undoubtedly, guilty of many rash and imprudent speeches, and seemed ambitious to be thought a man of consequence among his neighbors—yet the testimony, so far as it is before us, is very unsatisfactory in leading our minds to the conclusion of his guilt. Indeed, the witness, Norvill Hill expressly states, that the plaintiff was arrested by a squad of Confederates, and that they arrested him, the witness, at the same time, and that it was after the arrest that he first saw Heatherly; while it is stated by George Irvin, one of the plaintiff's witnesses, that Heatherly said, after the prisoners were started to Speedwell Camp Ground, that he told his son-in-law not to take them off, and that he was opposed to their being carried off. In the language of the witness, "Heatherly seemed as though he faulted his son-in-law, for sending them off." It is true that we find much illegal and irrelevant testimony in this record—but very little of it was objected to by the defendant. The defendant was several times

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proven to be a rebel, without objection. To counteract its effect, he asked the privilege of proving that he was a Union man, and not a rebel—this privilege the Court refused him. But the Court upon better reflection, withdrew from the jury all evidence touching the politics of the defendant. Its withdrawal was, perhaps, of no avail, it had done its mischief, and this character of irrelevant and improper proof, much more of which appears in the record, may have been the inspiration of this extraordinary verdict. Other matters, perhaps, more foreign than this to the issue, were submitted to the jury.

We can conceive of no rule of law more important to be observed in jury trials, than that the evidence should be circumscribed and confined to the issue to be tried. It means something more than a mere economy of time. It means that public justice can not be administered in its integrity and purity, if the minds of a jury are to be decoyed from the issue they are trying, and confused and confounded by a mass of irrelevant matter which can not tend to elucidate the issue. When once brought before a jury, it has generally performed its office. In the mass of relevant and irrelevant matter, it is humanly impossible, with many jurors, to eliminate the pertinent from the impertinent, the material from the immaterial, the legal from the illegal, and to divest themselves of those natural and human passions and prejudices which such testimony is often specially intended to generate. The question, whether defendant was of the Federal or the Confederate party, in our late war, was in no sense, legitimate in this case, in the state of the proof as here disclosed. We have held that, after a party is

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identified with a transaction occurring in those times, such proof might be admissible to indicate the *animus*, and explain the conduct of the parties in a certain class of cases, as in a case of alleged duress, when the action of the party relying on that defense, would, perhaps, be influenced by the political *status* of his adversary. But in this case, as it is here presented, the defendant had not been connected by proper legal proof, with the alleged trespass, at the time the evidence was admitted against him; and in the unhappy feuds which have survived the civil war, we can conceive of no more fatal virus, wherewith to poison and pollute the fountains of public justice, than the proof that the plaintiff or defendant belonged to the Union or the Southern party, as the character of the case, or the complexion of the jury might happen to prompt the introduction of such testimony. But, while, for the reasons already stated, we can not reverse the judgment for this cause, we may be permitted to reprobate the indiscriminate use of such testimony in future, and to indulge the hope that the time is rapidly passing away, when the rights of the Federal or the Confederate litigant are to be weighed by the complexion of his politics in a court of justice.

It seems that the soldiers had carried their prisoners to the house of the defendant, where they tarried for the night. A witness is permitted to prove, without objection, that while the party were starting to camp, next morning, with their prisoners, the family of the defendant seemed to rejoice, and betrayed their gratification in laughter. And, it is afterwards proven, under defendant's objection, that a sort of a trial of the

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prisoners was had at Speedwell Camp Ground, and that the Sergeant obtained some proof from the defendant's house, and "wrote it down." I suppose, said the witness, it was used at the trial. Now, the defendant was not present at the trial, nor is his name connected in any way with the act of obtaining proof against the prisoners at his house, or from a member of his family. It is not even stated that the proof was injurious or intended to be injurious to the prisoners; and, indeed, it could not have been very serious, as the prisoners seem to have been released at once, after the trial. This testimony was illegal and improper. It tends to prejudice the defendant in the minds of the jury. It detailed a transaction with which he had nothing to do; and which, so far as the proof shows, occurred in his absence. It was intended to impute to the family of defendant, an unfriendly disposition toward the plaintiff; and, by implication, to connect the defendant with it. When considered in connection with other circumstances in the case, it was, doubtless, fatal to the defendant. The demonstrations of defendant's family, however hostile, could in no way inculcate him in the commission of the alleged trespass, unless he is shown to have given them countenance by his presence or otherwise. Nor, indeed, even then would the proof be legitimate, unless the defendant had already been connected with the commission of the trespass. His association with the plaintiff's captors, in the arrest of the witness, Nelson, had not done it. *Autry v. Coffman*, 6 Cold., 510. His bravado and gasconade, indulged in, doubtless, to conciliate his military visitors, from whom

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it seems he had been concealing himself, to avoid conscription, had not connected him with the trespass upon the plaintiff. Indeed, there is no such proof as the law requires, by which the defendant is shown to have participated in the act of arresting the plaintiff; and while, in the state of the record, we have no right to assume that no such proof was adduced at the trial, we have no hesitation in holding that the admission of the illegal testimony referred to, was a grave error, for which the judgment must be reversed.

There are other errors assigned which might be worthy of consideration, but in the view we have taken of the case, it is unnecessary to examine any other question.

The judgment is reversed, and the cause remanded for a new trial.

JOSEPH A. BRANNER v. A. M. FELKNER.

1. RIGHTS OF WAR. *Capture.* The legality of a capture of private property in time of war, is not to be presumed, but must be proved.
2. CAPTURE. *Who may make.* A private soldier, without orders, can not make a capture of property in the hands of a citizen, in time of war.
3. SAME. *Proof.* Evidence that parties, dressed as soldiers, and claiming to be such, took out of the possession of a citizen, a horse, which had previously been used in the Confederate service, will not protect from the claim of the owner, a person afterward found in possession of the horse, claiming to have received him from the soldiers.

FROM JEFFERSON.

From the Circuit Court of Jefferson County, J. P. SWANN, J., presiding.

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JAS. T. SHIELDS, for plaintiff.

BARTON and MCFARLAND for defendant, cited Lawrence's Wheaton, 629; The Amiable Isabella, 6 Wheat. Rep., 1.

NELSON, J., delivered the opinion of the Court.

The plaintiff sued the defendant, in trespass on the case, to recover the value of a horse taken and converted by him, and proved, on the trial in the Court below, that he was the owner of the horse, and had left him with one Eckle, to be delivered to Captain Sharp for safe keeping, in the fall of 1863; that in a short time afterward, some persons, dressed as Federal soldiers, came in the night, and alleging that the horse had been used by the plaintiff, in the rebel service, took him away; that he was subsequently found in possession of defendant, who refused to deliver him to Eckle, the agent of the plaintiff, "saying that the horse had been left there by a soldier, and that he had agreed with the soldier, that he, the defendant, was to have the horse at a certain price, if he chose to give it; otherwise, the soldier was to pay him for keeping the horse. Defendant said he would not give up the horse, that there was money in the horse. Witness told defendant that the horse was the property of plaintiff, and that if he kept him, it might give him some trouble. Defendant said he would risk that, and that plaintiff, being a rebel, could not own any property. It was not clearly proved, but may, perhaps, be inferred from the testimony, that plaintiff was a rebel,

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and originally bought the horse for the purpose of using him in the rebel service, and rode him for a short time, as a conscript in that service. On the trial, his Honor, the Circuit Judge, instructed the Jury, among other things, "that if the plaintiff had used the horse in the rebel service, against the United States Government, in the late civil war, the horse became contraband of war, and became and was subject to capture. A private soldier of the United States, without any special order, can make a capture of any property contraband of war, and it is the law, that, when the property of one contending force is captured, it becomes the property of the captors; that is, it vests in the United States, if it is property contraband of war, but if it be not property contraband of war, but only forfeited because of some act of the owner, then, there must be a decree, or condemnation, and divestiture and vestiture of property before the forfeiture is complete." Under this charge, the jury found for the defendant, and the plaintiff, failing to obtain a new trial, filed his bill of exceptions and prosecuted his appeal to this Court; and in the opinion of this Court, there is error in the proceedings in the Court below.

There is no proof in the record to show that defendant was a soldier, or that the persons who took the horse out of Eckle's custody, were soldiers, except that they claimed to be soldiers, and were dressed as such. It is not shown to whose command they belonged, or claimed to belong, or that they acted, or claimed to act, under the orders of any superior officer; and the fact is well-known, that during the late war, and for some time after

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its close, depredations upon private property, and personal outrages of the most atrocious character were perpetrated by bandits and desperadoes, the outlaws of both armies, who, in the guise of soldiers, often plundered and murdered the peaceful inhabitants of the country. These outrages were of such general and frequent occurrence, that the Legislature, in May, 1865, passed An Act to punish armed prowlers, guerillas, brigands and highway robbers, with death. We are not aware that, either by the laws of nations, or the laws of war, the doctrine can be maintained that "a private soldier of the United States, without any special order, can make a capture of any property, contraband of war." Such a doctrine, if maintained and enforced, would subject peaceful citizens to the most tyrannical visitations, searches and exactions of the soldiers, and destroy every vestige of private rights and personal security. It would subject the inhabitants to the iron will of armed and lawless power, and confer upon the soldier the unlimited discretion to regard, as contraband of war, every article of property that might please his fancy, or stimulate his avarice. It would make him a judge, juror and executioner, according to his own capricious, vindictive and arbitrary will, and bring the people into the most slavish, degrading and intolerable submission. Whatever may have been the practice of the armies in our civil war, such a doctrine is contrary to the spirit of our institutions, and can not, in the view of the law, be tolerated, for one moment, by the slightest sanction or encouragement. In 1 Kent's Com., 91 m., it is said that "there is a marked difference in the rights of war, carried on by land and at sea. The

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object of a maritime war, is the destruction of the enemy's commerce and navigation, in order to weaken and destroy the foundation of his naval power. The capture or destruction of private property is essential to that end. But there are great limitations imposed upon the operations of war by land, though depredations upon private property, and despoiling and plundering the enemy's territory, are still too prevalent. The term *capture*, is generally applied to the taking of property by one belligerent from another, at sea, and *booty*, to the seizure of personal property by a public enemy on land; the proceeds of the former, when duly passed upon and condemned as prize, being distributed among the captors, while the latter belongs exclusively to the Government. But, in the acquisition of booty, a private soldier can not act without the general or special orders of an officer, and when he seizes property, and the lawfulness of his acts is called in question, the legality of the seizure is not to be presumed, but must be proved, as any other matter of justification.

In regard to officers themselves, it is well said that "the evils resulting from irregular requisitions, and foraging for the ordinary supplies of an army, are so very great, and so generally admitted, that it has become a recognized maxim of war, that the commanding officer who permits indiscriminate pillage, and allows the taking of private property, without a strict accountability, whether he be engaged in offensive or defensive operations, fails in his duty to his own government, and violates the usages of modern warfare." Halleck's Int. Law & Laws of War, p. 461, § 18. And in regard to soldiers, the law was

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correctly stated more than a century ago, by one of the ablest and most philosophic of authors, on the law of nations, as follows: "Soldiers can undertake nothing without the express or tacit command of their officers. To obey and execute is their province—not to act at their own discretion; they are only instruments in the hands of their commanders. Let it be remembered here, that, by a tacit order, I mean one which is necessarily included in an express order, or in the functions with which a person is intrusted by his superior. What is said of soldiers, must also, in a proper degree, be understood of officers, and of all who have any subordinate command. Wherefore, with respect to things which are not intrusted to their charge, they may both be considered as private individuals, who are not to undertake anything without orders. The obligation of the military is even more strict, as the marshal law expressly forbids acting without orders, and this discipline is so necessary, that it scarcely leaves any room for presumption. In war, an enterprise which wears a very advantageous appearance, and promises almost certain success, may, nevertheless, be attended with fatal consequences. It would be dangerous in such a case, to leave the decision to the judgment of men in subordinate stations, who are not acquainted with all the views of their General, and who do not possess an equal degree of knowledge and experience; it is therefore not to be presumed that he intends to let them act at their own discretion."

"Fighting without, orders is almost always considered, in a military man, as fighting contrary to orders, or contrary to prohibition. There is, therefore, hardly any

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case, except that of self-defense, in which soldiers and inferior officers may act without orders." Vat. Law of Nations, Bk. III., ch. XV., § 230, pp. 400, 401. These views are substantially embodied in the articles of war, prescribed by the Act of 1806, ch. 20, 2 U. S. Stat. at Large, 359-372. So stringent are these regulations, that, by Article 52, any soldier who, before the enemy, quits his post or colors to plunder or pillage, may, upon conviction, be punished with death; and it is not to be supposed that the laws of the United States permit plunder or pillage, at the discretion of soldiers, at any time.

The law on this subject, was, in our opinion, stated correctly by the Court of Appeals of Kentucky, in *Lewis v. McGuire*, 3 Bush Kentucky Rep., 203, 204. In that case it is said, that, "Neither the right of impressment nor the right to exact military contributions, belongs to every petty military officer, but must come from the commander of a district of country, or a post, or an army, and not from every straggling squad who may be under the command of some inferior officer of low grade. Nor, indeed, will either the commission or capacity in which an officer professes to act, fix his status, but the manner of his conduct; for, even a regularly commissioned officer, in the regular military service of a belligerent, may be guilty of such a line of conduct as to show he, in reality, belonged to an irregular, irresponsible plundering service, which can not be shielded by a regular commission." Adopting this view as to the powers, duties and liabilities of officers, we, of course, hold that too wide a latitude was given, in the charge

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of the Circuit Court, to those of the common soldier, and that the opinion of his Honor, that "a private soldier of the United States, without any special order, can make a capture of any property contraband of war," is not warranted by the laws of the United States, the laws of war, or the law of nations.

Reverse the judgment.

HENRY WAGNER, in error, v. HANNAH WOOLSEY,
Administratrix, &c.

1. CODE CONSTRUED. *Injury causing death. Proximate cause.* An action cannot be maintained under the Code, §§ 2291, 2292, giving a right of action to the personal representative of a decedent, for injuries resulting in his death, unless the death is the natural and proximate consequence of the acts proved.
2. SAME. *Same. Facts.* Proof that the plaintiff intestate was driven from his home by the defendants; afterward enlisted in the Federal army; was captured, and detained as a prisoner of war, and died in prison; held, that the death was not a consequence of defendant's acts, such as to subject defendant to this action.

FROM GREENE.

In the Circuit Court. E. E. GILLENWATERS, J.,
presiding.

NELSON and DEADERICK, J's, did not sit in this

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cause, having been of counsel—R. McFARLAND and J. T. SHIELDS Special J's, sitting in their stead.

J. G. DEADERICK, for plaintiff in error.

R. M. BARTON and S. T. LOGAN, for defendants.

FREEMAN, J., delivered the opinion of the Court.

This suit was brought by defendant in error, as administratrix of her deceased husband, under sections 2291, 2292, of the Code,* providing in substance, "that the right of action which a person who dies from injuries received from another, or where death is caused by the wrongful act or omission of another, would have had against the wrong-doer, in case death had not ensued, shall not abate or be extinguished by his death, but shall pass to his personal representatives, for the benefit of his widow or next of kin;" and such action may be instituted by such personal representative; or if he decline, the widow and children of the deceased may sue, &c.

The right of action that survives under this section of the Code, is one for injuries of which the party injured dies—that is, for injuries or wrongs causing his death; and this suit is brought on the assumption that the facts alleged and shown by the proof, caused the death of the husband, in the sense intended by the statute, or as a legal consequence of such acts. The proof shows, in this case, that the deceased did leave his home, and conceal himself for a considerable time in the

* Act of 1851, ch. 17.

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mountains; was greatly exposed, and endured much suffering, in consequence of the efforts of parties with whom, perhaps, plaintiff in error was connected; and if the suit had been brought by Woolsey himself for such wrongs, and the injury resulting to him from them, he might well have sustained his action on this proof, and recovered for suffering, annoyance and inconvenience.

But this action must be sustained by proof of wrongs or omissions, causing the death of the party; and we are constrained to say that there is, not only no satisfactory proof in the record that any injury done by the plaintiff in error caused the death of Woolsey; but on the contrary, that in a legal view of the proof it is clearly and distinctly shown that his death was caused or resulted from other acts, by other parties, with whom the plaintiff in error had no connection, and in which he had no participation; and we may add, that the acts of the other parties referred to were brought on, induced and caused by the voluntary act of said Woolsey himself in assuming the character and responsibilities of a soldier of the United States.

The rule of law is familiar, that seems to have been in many cases of this character entirely ignored, that damages, to be recovered, must be the natural and proximate consequence of the act complained of. Mr. Greenleaf lays down in Volume II. of his work on Evidence, § 268, "that, in proof of damages, both parties must be confined to the principal transaction complained of and to its attendant circumstances and natural results." In view of these well settled principles, and the plain language of the Code, the verdict of the jury could not

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be sustained, even under the most liberal rule in favor of their finding on the facts.

It is clearly shown that the plaintiff below enlisted as a Federal soldier; had, in connection with a party of such soldiers, and under the orders of his commanding officer, started through the Confederate lines into Kentucky; that he was captured, and that, by a Confederate command, with which this plaintiff in error had no connection; of which, perhaps, he had at the time, never heard. In being captured, he simply shared the fate of the soldier, and having assumed its duties, its responsibilities and dangers must be presumed to have been contemplated by him. So that it may, with much more force, be said that his death was caused by his own act, in enlisting as a soldier, than by the act of the plaintiff in error, in attempting to arrest him, or compelling him to remain from home. This act of his was a more proximate and immediate cause of his death, than the acts of plaintiff in error, as shown in this record.

We need not discuss this question at length. It is clear the Code intended to give the action to recover damages for an act or omission of a party which caused the death of another. The acts of the plaintiff in error, caused, in no legal or legitimate sense, any thing further in this case than the absenting of Woolsey from his home; and his exposure and suffering in consequence of such absence is all that can be fairly predicated of them. That these acts caused his death, no man can affirm, we think, in any legitimate or legal sense; or that his death, under the circumstances of this case, in

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prison as a captured soldier, gave any cause of action for his death, upon any fair construction of the statute, to his administrator or widow, or next of kin, we think, can not be maintained, except by doing violence, not only to the plain language of the law, but to common sense and justice.

Let the case be reversed, and remanded for another trial.

MINERVA CHESNEY v. WILLIAM M. RODGERS.

1. EQUITY PLEADING. *Demurrer. Special.* That a case is properly one of legal cognizance must be specially stated, as a ground of demurrer to a bill. A general demurrer for want of equity, admits the jurisdiction. Code, §§ 2865, 2934, 4318, 4319, 4321, 4385, 4386, 4388; *Kirkman & Ellis v. Snodgrass*, 3 Head., 372.
2. CAPTURE. *Facts to prove title under.* Proof that a horse was captured during the civil war, by a few Federal soldiers, from two or three persons dressed as rebel soldiers, said to belong to Morgan's command; turned over to a County Provost Marshal; and that afterward, it came into the defendant's possession, he claiming to have obtained it by military order, is not sufficient evidence to defeat the right of the owner, from whom it had been taken by theft or unlawful force.*

FROM UNION.

In the Chancery Court at Maynardsville, O. P. TEMPLE, Ch., presiding.

*See *Dapson v. Susong*, post p. 243, and *McAdams v. McChristian*, in note to page 245.

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J. R. COCKE, for complainant, cited the Code, 2934, and 3 Head, 370.

E. C. CAMP, for respondents.

NELSON, J., delivered the opinion of the Court.

This may be styled *a bill of replevin*; and if the power rested with us to determine whether a proper line of demarkation should be kept up between the different judicial tribunals, we would declare, without hesitation, that the jurisdiction of the County, Circuit and Chancery Courts, should be so regulated as to confine each within its appropriate sphere, and not to allow either to entertain concurrent jurisdiction with the other. But as it is our province to declare, and not to make the law, we are constrained to hold that the demurrer to the bill in this case, was as the law now stands properly disallowed. The bill was filed to enjoin the defendant from prosecuting an action of replevin, which he had brought against complainant for a mare; to cause the animal to be surrendered to her, and for general relief. One Bluford Venable, was, originally, a defendant, but having disclaimed in his answer, no decree was pronounced against him, and the case was brought here alone upon the appeal of William M. Rodgers. The demurrer is in exact accordance with the form of a general demurrer for want of equity, given in note 3, to Story's Eq. Pl., § 455, p. 494, 4th edition; and again set out in note 3 to § 483. In disallowing the demurrer, the Chancellor granted leave to insist on the same, or other grounds of the demurrer, in the answer;

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and it was insisted, in the answer, that the matter complained of, could be tried and determined at law, and that complainant is not entitled to any relief from a Court of equity. By the Code, sections 2865 and 2934, demurrers for formal defects are abolished, and those only, for substantial defects are allowed, and it is declared that all demurrers shall state the objection relied on. In *Kirkman & Ellis v. Snodgrass*, 2 Head, 372, it was held, that, by sections 4318 and 4319, the defendant can not avail himself of a want of jurisdiction in the Court, except he do so by plea or demurrer; and that, by section 4321, the filing of an answer is a waiver of objection to the jurisdiction of the Court, and that the cause shall not be dismissed, but heard and determined upon its merits, although the Court may be of opinion that the matters complained of, are of legal cognizance. This construction is also supported by section 4385. Sections 4386 and 4388 provide, among other things, that a bill may be dismissed on a motion, or upon demurrer, "for want of equity on its face," but, construed in connection with the other sections, it is manifest that the intention was to require the demurrer to specify in what the want of equity consists. In Story's Eq. Pl., § 455, demurrers are said to be general, when no particular cause is assigned, except the usual formulary, that there is no equity in the bill; and special, when the particular defects or objections are pointed out; but in the case under consideration, the particular defects or objections are not pointed out in the demurrer, either within the meaning of the Code or the general Chancery rule of practice.

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The vast number of witnesses usually examined upon the question of identity, in "*horse causes*," do not seem to have been marshalled in this; but the eleven witnesses examined in behalf of complainant, testifying, as they do, to the complainant's ownership, and to their knowledge of the animal in controversy, by size, age and special marks, greatly outweigh the nine witnesses examined for the defendant, of whom only two seem to entertain any doubts of her identity. Indeed, the principal ground of defense relied upon seems to be, that the mare was captured by a few Federal soldiers, from some two or three persons dressed as rebel soldiers, said to belong to Morgan's command, and to have been on their way to Kentucky; turned over to the Provost-Marshal of Union County, and by him delivered, pursuant to some verbal or written order from the Provost-Marshal General of East Tennessee, to the defendant. On the other hand, it is shown very clearly, that the complainant was a widow, who, in the language of the witnesses, was in "hard circumstances;" that the mare was stolen from her, or taken by unlawful force; and even if it had been established in evidence that the soldiers of the United States had captured her in lawful war, a doubt might well arise, whether the Government acquired any better title than the original thief or trespasser. *Goff v. Gott*, 5 Sneed, 564; *Arendale v. Morgan*, *Ib.*, 712, 714; *Gage v. Epperson*, 2 Head., 671; Bright Fed. Dig., 843, No. 39. But we do not decide this question, as the evidence in this case fails to satisfy us that the alleged *capture*, itself, was a lawful act of war, or, if lawful, that the Provost Marshal had any authority to give, or did, in fact, give the animal in question to

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the defendant. *Merritt v. The Mayor and Aldermen of Nashville*, 5 Cold., 98, 101. Branscom's evidence on this point was objected to, and he was unable to state whether he acted under a verbal or written order from the Provost Marshal; and, although he thought he acted under a written order, he did not establish a sufficient search to let in parol evidence as to its contents.

On the whole, we are satisfied as to the correctness of the Chancellor's decree, and order that it be affirmed with costs, and that the cause be remanded for an account, as he directed.

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1. CAPTURE. *Title of U. S.* The title of the Government of the United States to personal property, is subject to be contested by a citizen who has a claim to the property.
2. SAME. *Government brand.* United States brand on stock, and a sale of it at public sale, will not preclude the true owner of the stock from the recovery of it. Government brands on stock are evidence that the United States has had the property in possession as a claimant, but does not prove a title.
3. RIGHTS OF WAR. *Public enemy.* See *McAdams v. McChristian*, in note to p. 245.

FROM COCKE.

In the Circuit Court. E. E. GILLENWATERS, J., presiding.

In 1863, plaintiff lost a mule, taken by force from

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his family, in his absence, by a party of Confederate soldiers. In 1865, the plaintiff found his mule in the possession of the defendant, who claimed to have bought it at a government sale. It was not branded when taken, but had brands, C. S., U. S., and I. C., when found.

BARTON, McFARLAND, and EVANS, for plaintiff; cited Story on Sales, § 188; *Arendale v. Morgan*, 5 Sneed, 712; *Parham v. Riley*, 4 Cold., 10.

R. McFARLAND, for defendant, cited *Cook v. Howard*, 13 Johns., 175.

NICHOLSON, C. J., delivered the opinion of the Court.

This is an action of replevin for a mule, tried in the Circuit Court of Cocke County. Plaintiff failed in his suit, and appeals, in error, to this Court.

The question for our determination arises upon the charge of the Circuit Judge, which was as follows:

“Where the Government of the United States, in the prosecution of the late war, came into the possession of horses, whether by capture from the public enemy, by purchase, or by impressment from citizens, and placed thereon the brand U. S., and sold the same at public sale, the purchaser acquired a title which the courts of the country, from considerations of public policy, quieting titles and preventing litigation, will perfect and sustain, and will not go behind the acts of the Government to ascertain or adjust the right of claimants to said property, as between themselves.”

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This charge is erroneous in several respects. It assumes that in all cases in which the government obtained possession of horses, either by capture, by purchase, or by impressment, the title will be good, if the horses were branded U. S., and if the same were sold at public auction. The proposition is stated too broadly. If the government acquired possession by capture, or by purchase, or by impressment, from one who was guilty of a felony in taking the property from the true owner, or from one to whom the felonious taker had transferred the property, the government would acquire no title: Story on Sales, § 188; 5 Sneed, 712; 4 Cold., 10.* Neither the placing of the brand "U. S.," nor the

* See Chesney v. Rogers, *ante* 239.

This question was further considered in the following case, decided at Nashville, December, 1870:

W. S. McAdams v. James S. McChristian.

W. H. WISENER, for plaintiff in error.

NICHOLSON, C. J., delivered the opinion of the Court.

This is an action of trover for the conversion, by defendant, of a mare the property of the plaintiff, tried in the Bedford Circuit Court at the December Term, 1866, before John P. Steele, J. There was a judgment for the defendant, and the cause is here by writ of error.

The facts are, that in June or July, 1864, in the night time, some four or five men came to the house of plaintiff, and, by force and against the will of plaintiff, took the mare away; that soon afterwards, a squad of Federal soldiers, under the command of a Captain, being out on duty, met three or four men dressed in gray, armed with pistols and carbines; that they had a running fight, in which one of the men in gray was killed and his mare captured; the mare so captured was the same forcibly taken from the plaintiff a few nights before; that the Captain, with the consent of the officer in command at Tullahoma, exchanged his own horse for the mare; and that he afterwards sold the mare, and she came into the possession of defendant. It was proved that the man who was riding the mare in the running fight and who was killed, did not belong to the Confederate army at the time.

Upon these facts, the Circuit Judge charged the jury, that "if they should believe, from the proof, that the mare in controversy was captured by the

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public sale of horses so acquired, would communicate any title. The brand, when shown to have been made by officers of the army, has no other effect than to furnish *prima facie* evidence that the government has had possession of the property as a claimant, but of itself it communicates no title: *Plummer v. Newdegate*, 2 Duval, 3; *Richardson v. Tipton*, 2 Bush., 202. The purchaser at public auction, gets only the title of the government, and if the government had no title, the purchaser gets none. The title of the government to property is liable to be contested in the same manner as that of individuals, and the courts have no power to perfect or sustain void titles, simply because the government may have had possession of property and placed upon it its brand. The charge of the Circuit Judge denied to the jury the

forces of the United States from the public enemy, in a contest of arms, then she would belong to the captor or the government whose soldiers they were; and in that event they should find for the defendant; that if the party from whom the mare was captured were a force or company of men, armed as soldiers, dressed in the uniform of rebel soldiers, and fought the Federal soldiers dressed in the Federal uniform, that would constitute them the public enemies of the United States."

Both of the propositions contained in this charge are erroneous. It was held by this Court at Knoxville, in the case of *Dawson v. Susong*, that "if the government acquired possession by capture, or by purchase, or by impressment, from one who was guilty of a felony in taking the property from the true owner, or from one to whom the felonious taker had transferred the property, the government would acquire no title." This is conclusive as to the first proposition laid down by the Circuit Judge. The next proposition as to the circumstances which would constitute the squad of men from whom the mare was captured, public enemies, is equally erroneous. It by no means follows that, because the men were dressed in gray, and fought the Federal soldiers dressed in blue, they were such public enemies as were entitled to the benefit of the rights of war.

For these errors, the judgment will be reversed, and the cause remanded for a new trial.

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right to inquire into the manner by which the government acquired possession or title.

For these several errors, the judgment will be reversed, and the cause remanded for another trial.

H. H. INGERSOLL v. A. W. HOWARD, Judge, &c.

1. ATTORNEY AT LAW. *Not an Officer. Oath.* The Act of 1868, c. 2, §. 5, requiring the Courts to administer the abjuration of the Ku-Klux, to "all officers," did not apply to Attorneys.
2. OATH. *Power of Court to impose.* The Courts had no power to require such oath, by a general rule.
3. PARTIES. *Judge. When a party to mandamus. Costs.* If a judge improperly exclude an attorney from practice, and refuse to put the order on record, or allow him to appeal, he is a proper defendant to a mandamus, and liable for cost.

FROM GREENE.

From the Criminal Court of Greene County, A. W. HOWARD, J., presiding.

This case being docketed in the name of *H. H. Ingersoll v. The State*, on motion of the Attorney-general, it was ordered that the same be corrected, so as to stand *H. H. Ingersoll v. A. W. Howard, J.* In support of the motion, he cited *Evans v. The Justices of Claiborne County*. 3 Hay., 26, 29; *Sevier v. The Justices of Washington County*, Peck, 334, 361; and *Hardin v. The Justices of Hardin County*, Peck, 291.

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NICHOLSON, C. J., delivered the opinion of the Court.

At the March Term, 1869, of the Criminal Court of Greene County, the following rule of Court was read in open Court, and ordered to be spread of record as an order of Court.

“ORDER OR RULE OF COURT.

“The subject matter of establishing a uniform rule of practice for the government of Attorneys practicing in the Criminal Court in the First Judicial Criminal District of Tennessee, under the Act of the General Assembly of the State of Tennessee, passed on the 10th day of September, A. D., 1868, entitled ‘An Act to preserve the Public Peace,’ being under consideration, the Court is pleased to order and direct, that it shall hereafter be an established and uniform rule of Court in the First Judicial Criminal District, that all attorneys proposing to practice in said Court, in any of the counties in said district, before being permitted to do so, shall, under oath, give satisfactory evidence that they are in no way associated obnoxious to the provisions of said Act of Assembly, passed on the 10th of September, A. D., 1868, as required by said Act, as the same is construed and understood by the Court. The above rule shall be peremptory and uniform until such time as the same may be altered or modified by the Court. It is not made with a view to oppress, nor with a view of making invidious distinctions, but in compliance with, what is understood by the Court, to be a solemn duty, made so by the

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provisions of said Act of Assembly. This January 12th, A. D., 1869.”

Upon the entry of this rule of record, the Criminal Judge, A. W. Howard, ordered the Clerk to destroy the old roll of attorneys, and make a new roll, and to enter the name of no attorney thereon who had not complied with the above rule. In obedience to this order, the names of the attorneys were stricken from the roll, including the name of H. H. Ingersoll, the petitioner, who had been, for six months, a practicing attorney in said Court. Petitioner inquired of the Judge in open Court, if such was the order of the Court, whereupon the Judge ordered the Clerk to read said rule for the information of the attorneys present. Petitioner then stated to the Judge that he was not obnoxious to the provision of the Act of Assembly; and that he was opposed to the *Ku-Klux Klan*, and all other secret political organizations in existence in Tennessee, or in the United States; but, as the rule was a new one, and the oath extraordinary, he asked the privilege, in behalf of himself and brother attorneys, of being heard upon the same; but the privilege was “insultingly refused.” Petitioner then stated to the Court, in a respectful manner, that as there was a wide difference of opinion upon the construction of said Act of Assembly, between the presiding Judge and all the other Judges of this section of the State, he wished an authoritative construction of the same from the Supreme Court; and, in order to obtain it, asked the Judge to have a motion entered of record, that petitioner be permitted to practice without taking the oath prescribed in said order; and to

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decide the same, that petitioner might have something from which to appeal to the Supreme Court. But this motion the Court refused to enter of record, and fined petitioner for contempt of Court, in making such a request, and peremptorily ordered him to take his seat, saying, that petitioner had no right as an attorney or a party, to be heard in that Court. Petitioner then procured another attorney, who was not under *ban*, to make the same motion for the same purpose, but the Judge peremptorily refused again to enter said motion of record, and threatened to fine said attorney for contempt, at the same time stating that he would not permit the correctness of that rule to be called into question, nor would he permit anything to go of record, from which an appeal could be taken. The attorney aforesaid, then stated that he would prepare a bill of exceptions to the action of his Honor, in refusing to allow the motion to be entered, but the Court replied that he would not sign any bill of exceptions to the action of the Court in the premises.

In April, 1869, the said H. H. Ingersoll presented his petition for a mandamus, to one of the Judges of the Supreme Court, in which the facts already cited were alleged, when the said petition was granted, and the said A. W. Howard required to appear and show cause why a peremptory mandamus should not issue, commanding him to have the proceedings complained of entered of record, to the end, that the same might be revised in the Supreme Court.

On the day fixed, the said A. W. Howard, entered his appearance in the Supreme Court, and filed his answer, in which he states, at great length, his reason

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for adopting the said rule, and for refusing to allow petitioner's motions to be entered of record. He states that the "Act of the 10th of September, 1868, being placed in respondent's hands, and sworn, as respondent was, to administer the law faithfully, and finding in the 5th section of said Act, the following language, viz: "That it shall be the duty of all the Courts of this State, at every term, for two years, from and after the passage of this Act, to call before it all the officers thereof, who shall be sworn, and have this Act read or explained to them, and the Court shall ask said officers if they shall have any knowledge of any person in the State, or out of the State, that shall be guilty of any of the offenses contained in this Act," *etc.* "Construing the 5th section of said Act, as including attornies as officers of the Court, in the meaning of the makers of the statute, he had no alternative left him, in the court of his own conscience, but to administer to them the oath, in connection with the officers of the Court," and hence he adopted the rule already set out. The reason of the respondent for not allowing petitioner's motions to be entered of record are stated as follows, viz: "that respondent did not regard the said Ingersoll as being associated in any way obnoxious to the Act of September 10, 1868, and had to refer his motive in resisting the rule, to some other cause. And the conduct of Mr. Ingersoll warranted such conclusion. That he manifested a disposition to browbeat and override the Court, and bring its authority into contempt; believing this, respondent may have acted with some degree of promptness, which respondent might not, upon other oc-

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casions manifest, where due courtesy was shown. Respondent believed at the time, and still believes, it was an absolute duty to the bench, to inflict some degree of punishment upon Mr. Ingersoll, which respondent believed at the time, and still insists, was done in leniency and forbearance."

As a further reason for not allowing petitioner's motion to be entered of record, respondent says: "To say that all the rules of the Circuit, Chancery and Criminal Courts, made for their own protection, and for the dispatch of their own business, and made in accordance with the written law, are subject to revision in the Supreme Court, wherever any captious attorney sees proper to make a question upon the rules, and carry them up to the Supreme Court, is just to destroy the inherent powers of the inferior tribunals, and take from them all their dignity, and all their rights of protecting themselves."

After appearing and filing his answer to the alternative mandamus, Judge Howard, at the July Term, 1869, of the Criminal Court, at Greeneville, had a complete record of the proceedings, on Mr. Ingersoll's motion, entered of record, including a bill of exceptions, and the granting of an appeal, of all which we have a transcript in this Court, under the improper caption of *H. H. Ingersoll v. The State*. This is the record, to procure which, Mr. Ingersoll filed his petition for a mandamus, and which would have been procured by a peremptory mandamus, if one had been ordered by this Court. Whilst, therefore, it is unnecessary for this Court to order a peremptory mandamus, we deem it proper to remark, that, upon

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the petition and answer thereto, a case is presented which would have justified this Court in ordering a peremptory mandamus. If the Judge had been right in his construction of the Act of the 10th of September, 1868, and was authorized thereby, to adopt the rule as to attorneys, his refusal to hear a motion to allow Mr. Ingersoll to practice, without taking the prescribed oath, and to allow the motion to be entered of record, and to sign a bill of exceptions, were abuses of his judicial authority and derelictions of official duty, so palpable, that this Court could not have hesitated to interpose for the protection of the rights of Mr. Ingersoll, and for the correction of the errors involved in this exercise of judicial functions. Nor are we able to discover the slightest legal excuse for his course in the reasons relied on by the Judge, in his answer to the alternative mandamus. If Mr. Ingersoll was guilty of violating any of the proprieties of an Attorney in his demeanor towards the Judge, (of which we have failed to discover the evidence,) it was competent for the Judge to protect the Court by inflicting punishment, but to undertake to prevent his own official action from being reviewed and revised, upon appeal to a higher tribunal, by refusing to allow proper motions to be made or entered of record, and by refusing to give the benefit of exception to his rulings in bills of exceptions, was a mode of maintaining "the inherent powers of the inferior tribunals," and of preserving "their dignity," and of "protecting themselves," altogether novel and unsupported by law. But as we have already remarked, a peremptory mandamus would now accomplish nothing, especially since the Criminal Court

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of which the said Howard was the presiding Judge, has been abolished by statute; we therefore deem it unnecessary to make any further order, in the matter of the petition for mandamus.

Upon the record, setting forth the proceedings in the case, as made out and sent up, in answer to the alternative *mandamus*, we deem it proper to remark that we think the rule of Court, as applicable to the government of the attorneys in the Criminal Court, over which Judge Howard presided, was based upon a total misconstruction of the 5th section of the Act of September 10, 1868. It is provided in that section, "that it shall be the duty of all the courts of this State, at every term, for two years, to call before them all the officers thereof, who shall be sworn, and have this Act read or explained to them." Although, in one sense, an attorney is an officer of the court, yet, that he does not belong to the class of officers referred to in this section, is too clear to admit of discussion, or to require elucidation. The idea that the Legislature ever intended that the Judges should call before them, at any term, for two years, all the attorneys of their respective courts, and have the Acts of Assembly read or explained to them, and have them sworn to disclose, as common informers, all their knowledge as to persons, in or out of the State, who have been guilty of the offences in the Act commonly known as the *Ku-klux* law, is so palpably absurd, that it cannot be entertained for a moment. The language of the Act plainly indicates that it was intended by the Legislature to apply only to those persons who held offices, and who were subject to the or-

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ders of the Court, but not to attorneys, who hold no office, and who are not subject to the order of the Court, except in well-defined instances. See 2 Toml. Law Dict., title, Office, 665.

It appears from the record, that the petitioner was a regular practicing attorney in the First Criminal Circuit, and, as such, entitled, as a matter of right, to appear in the court for suitors, and to argue causes. As decided in the case of *ex parte, Garland*, 4 Wallace, 379, "this right was something more than a mere indulgence, revocable at the pleasure of the Court, or at the command of the Legislature. It is a right of which he can only be deprived by the judgment of the Court, for moral or professional delinquency." And in the case of *Champion v. The State*, 3 Cold., 114, this Court says: "It appears from the records of the Court, the plaintiff in error had been admitted as a practicing lawyer in that court, and that he was a regular licensed attorney of this State; and having taken the oath required by law, as prescribed by section 3965, enrolled as an attorney; and the Judge, holding the Court had no right to impose other conditions than those embraced in section 3965."

Holding, as we do, that the Legislature did not intend to subject attorneys to be called before the Judge and sworn as to their knowledge of offenders, under the Act of September 10, 1868, it follows, upon the foregoing authorities, that the Judge had no right to make or to enforce the rule aforesaid, against the petitioner. The relief prayed for by the petitioner is, therefore, granted; and the defendant, A. W. Howard, will pay the costs of this proceeding.

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THE SOUTHERN EXPRESS COMPANY, in error, v. L. A.
WOMACK.

1. CARRIER. *Freight paid in illegal currency. Effect.* If a common carrier accepts goods to be carried for hire, the fact that the freight was paid and accepted in an illegal currency, would not affect his liability for the loss of the goods by negligence.
2. EVIDENCE. *Affidavit of loss. Bill of exceptions.* An affidavit of the loss of primary evidence is no part of the evidence submitted to the jury, and the failure to make it part of the bill of exceptions does not negative its existence, though the bill purport to contain all the evidence.
3. RECEIPT. *Delivery.* Delivery of property may be proved, though a receipt be given, without accounting for the receipt.
4. CARRIER. *Evidence to make question of restricted liability.* A printed form of receipt, generally used by carrier, but not used in the particular case, and not shown to have been known to the employer, does not raise the question of the power of a carrier to restrict his liability by contract.
5. SAME. *Freighted. Concealment by.* A person omitting, without fraud, to state the character and contents of packages, fully, may be precluded from receiving the value of the articles so omitted; but his right to recover for articles enumerated will not be affected.
6. SAME. *Want of transportation.* Want of means of transportation to carry articles received for transportation, is no defense to a suit for failure or delay to carry them. It is questionable whether this liability can be limited by contract.
7. SAME. PUBLIC ENEMY. *United States was.* In the late civil war, the troops of the United States were a "public enemy," against whose act a common carrier, within the Confederate lines, did not insure.

FROM SULLIVAN.

In the Circuit Court. R. R. BUTLER, J., presiding.

DEADERICK, J., having been of counsel, did not sit in this cause.

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J. G. DEADERICK, for plaintiff in error, to show that a carrier may restrict his liability, cited Peck, 270; 7 Yerg., 340; 5 Yerg., 71; 4 Yerg., 48; Meigs, 502; 1 Swan, 456; 3 Hum., 260; Ang. on Car., § 127, 220 *et seq.*; 1 Cold., 272, 283.

On the effect of concealment he cited Story on Bailm., § 565.

R. M. BARTON, on the same side, cited, to show who were public enemies, *Branner v. Felkner*, ante 228; *Smith v. Brazleton*, ante 44; Redfield on Railw., p. 5, c. 26, § 1, sub sec. 2; 1 Smith's Lead. Cas., 365, ed. of 1866; *Jones v. Walker*, 5 Yerg., 427; *Oraig v. Childress*, Peck, 270.

On duty to provide transportation, 2 Red. on Rw., 131, c. 26, § 17.

W. H. MAXWELL, for defendant in error, insisted that the United States could not be regarded as a public enemy, citing *Thornburg v. Harris*, 3 Cold., 157; *Hammond v. The State*, *Ib.*, 129. On the duty to forward, whether the consideration paid was good or not, it being an executed consideration, he cited *Jones v. Thomas*, 5 Cold., 465; Ang. on Car., §§ 584, 586. To excuse carrier, the loss must be by act of God or the public enemy. *Ib.*, §§ 67, 68, 151, 153, and notes, 154, 156.

Obligation to provide transportation. *Carter v. Peck*, 4 Sneed, 201, 208; *E. T. & Va. R. R. Co. v. Nelson*, 1 Cold., 272.

Concealment of contents of packages must be fraudulent to bar right. Angell on Car., §§ 258-9, 261-2, 264, 268; *Johnson v. Stone*, 11 Hump., 419; Notice of

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claim to limit liability, Ang. on Car., §§ 246-7, 250; *Walker v. Skipwith*, Meigs, 502, 507, 509; Power of Agents, 2 Red. on R., c. 24, § 164; No. 8, p. 116.

Carrier can not limit responsibility: Ang. on Car., §§ 238, 244; 2 Greenl. on Ev., §§ 215, 216; *Craig v. Childress*, Peck, 270; (*Turney v. Wilson*, 7 Yer., 340 is obiter;) *Walker v. Skipworth*, Meigs, 502; *Porterfield & Brooks v. Humphreys*, 8 Hump., 497; *Manning v. Wells*, 9 Hump., 746; *Johnson v. Stone*, 11 Hump., 419; *Kirtland v. Montgomery*, 1 Swan, 452; *Scruggs v. Davis*, 3 Head, 664.

J. T. SHIELDS, for defendant, as to who are enemies against whom carrier does not insure, cited 7 Yerg., 342; Story on Bailm., § 25; 2 Kent, 598; Story on Contr., § 752.

Contract to pay in Confederate notes valid in Virginia, 2 Kent, 454.

Carrier can not restrict liability by notice: 21 Wend., 153, 354; *Gould v. Hill*, 2 Hill, (N. Y.,) 623; Story on Contr., § 760 e., and authorities there cited; *Hollister v. Newland*, 19 Wend., 234; *Cole v. Goodwin*, *Ib.*, 251; 25 Wend., 459; Story on Bailm., § 554, n.; *Atwood v. Reliance Trans. Co.*; 9 Watts, (Pa.,) 87; 10 Ohio, 145.

He insisted Peck 270, 5 Yerg., 71, 1 Yerg., 343, 4 Yerg., 48, 51, should be overruled.

J. R. COCKE, with him, cited as to Confederate Notes, *Thorington v. Smith*, 9 Wal., 1; *Smith v. Brazelton*, ante, 44; Authority of Agent, *Walker v. Skipwith*, Meigs, 502; Story on Agency, § —; Paley on Agency, 162, 9.

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R. McFARLAND, S. J., delivered the opinion of the Court.

This is an action brought by defendant in error against the plaintiff in error as a common carrier, for failing to carry and deliver a quantity of household goods, notes, bonds, checks, &c., according to contract, from Prospect Depot, in Virginia, to Bristol, Tennessee; and in another count, for failing to deliver said goods at Lynchburg, Virginia.

The plaintiff recovered in the Court below, and a new trial being refused the defendant, an appeal in error has been presented to this Court.

A number of pleas were filed. Upon some of these there was issue, and to others a demurrer was sustained. We do not deem it necessary to consider the questions raised by these pleadings, for, in our opinion, all the defenses therein indicated, so far as they are good in law, might have been made under the first plea, which is *non assumpsit*. We will, therefore, proceed to enquire whether the plaintiff in error had the full benefit of all the defenses to which he was entitled under the general issue.

The proof tends to show the following state of facts: The plaintiff in error was a common carrier, in the full, legal sense of the term, from Richmond, in Virginia, to Bristol, Tennessee, by way of Lynchburg. Their mode of transportation was by railway. Prospect Depot was a way station between Richmond and Lynchburg. About the middle of March, 1865, the boxes containing the goods in question, were delivered to R. V. Davis, the

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agent of the Company at Prospect Depot, for transportation to Bristol, the boxes being properly marked. Davis gave Mrs. Womack, the wife of the defendant in error, a receipt simply acknowledging the receipt of the goods for transportation, and received from her the amount of charges for transporting the goods to Lynchburg, in Confederate money, he not being authorized to collect the charges any further.

The proof further shows that the railway trains upon which the plaintiffs in error carried freights, continued to pass daily in the direction of Lynchburg, with, perhaps, some occasional interruption, until near the 7th of April. That, for the first four days after the goods were received, Davis carried them to the track of the railroad, as the train passed, and tendered them to the "Messenger" as he is called, who was the agent of the company, and whose duty it was to receive the goods upon the train, and forward them. That the messenger declined to take the goods on, alleging that he had no room for them, but would try to take them next day. After this, Davis continued each day for some weeks to apply to the messenger to take the goods, but was "put off" from day to day, with substantially the same reply. That towards the 7th of April, one Thomas Agee, who had hauled the goods to the depot, and who was the friend of the defendant in error, finding that the goods were still in the depot, and that hostile armies were approaching, proposed to Davis to take charge of the goods, and haul them away, and take care of them, but this proposal was refused by Davis. On the 7th of April, the depot was captured by the United States forces, and the goods cap-

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tured or destroyed, except a small quantity that were afterwards recovered by the defendant in error.

The proof for the plaintiff in error shows that, at the time the goods were received, Prospect Depot was inside the military lines of the Confederate forces, and so remained until the 7th of April. That the line of railroad referred to was not owned by them, but that they hired from the railroad company a car which they used on each trip for the transportation of their freight. The proof further shows that between the 16th of March and the 7th of April, large quantities of freight were sent from Richmond and other points in the direction of Lynchburg; that the Confederate military forces had the preference upon the road, and on some occasions the "Express car" was taken from the plaintiff in error, for the use of the military, and the proof renders it probable that the express cars, during that period, were loaded to their capacity, when going in the direction of Lynchburg, before they reached Prospect Depot.

It was further proven by the plaintiff in error, that they generally used a printed form of receipt which they gave when goods were delivered to them, but at the time of this transaction, the agent, Davis, had none of these blanks on hand.

It was also proved by them, that when Mrs. Womack was asked what the boxes contained, she replied that they contained "beds, bed clothing, wearing apparel," *etc.*, but did not disclose that they contained bonds, notes, or anything of that character, the question being pressed upon her no further.

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Upon this, various questions are made and argued as to the action of the Court below.

1. His Honor, the Circuit Judge, was asked to instruct the jury, that if the charges for the transportation of the goods were paid in Confederate Treasury notes, this being the consideration of their undertaking, the contract would be void, and no recovery could be had. This instruction was refused, and we think properly. Conceding, for the argument, that Confederate notes loaned, would not form a good consideration for a promise to pay money, we think the doctrine has no application to this case. The consideration of the undertaking upon the part of the plaintiff in error, was, that the goods should be then and there delivered to them, to be carried for hire, to be then or afterwards paid to them. For this they had a lien upon the goods. If they chose voluntarily to receive the charges in advance, in Confederate money, we hold that this did not relieve them from their obligation to carry the goods according to the contract, or from liability for the loss of them. It has furthermore been held at the present term, that a contract founded upon a consideration of "Confederate money" is not necessarily illegal.†

2. The Court was asked to instruct the jury, that if a receipt was executed by the agent of the company, upon the delivery of the goods, this receipt would be the highest evidence of the contract, and no parol evidence could be heard to establish the contract.

In response to this "his Honor told the jury that if

† See *Naff v. Crawford*, ante 111.

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the proof showed that a receipt was executed at the time of the delivery of the goods, and that it was lost or unintentionally misplaced, then parol evidence is admissible to prove the contents thereof, and that the plaintiff having made oath of the loss or unintentional misplacing of the receipt, parol evidence of its contents might be looked to."

The affidavit referred to does not appear in the record. The record purports to contain all the evidence. This affidavit however was no part of the evidence to be submitted to the jury; it simply serves the purpose of laying the foundation for the introduction of parol evidence of the contents of the paper. The plaintiff in error having failed to incorporate this affidavit in the bill of exceptions, we must presume that the affidavit was made as stated by his Honor in his charge, and met the requirements of the law in such cases, and that the evidence was upon this ground properly admitted.

Again, according to the evidence, this receipt did not purport to contain any contract, but was simply an acknowledgement of the receipt of the goods for transportation. In such a case, on the receipt of the goods, for transportation, without any express stipulations as to the measure of liability, the law supplies the contract, and fixes the rights and liabilities of the parties, and the mere delivery of the property, which is the only fact intended to be established by these receipts, may as well be proven by parol evidence as otherwise.

3. The defendant offered in evidence a receipt which seems to have been a printed form, such as the Express Company were in the habit of using. This receipt con-

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tains many limitations upon the company's common law liability as carriers, and in fact, provides that they shall only be liable in case of gross negligence, or fraud of their agents, and throws the burden of proving this upon the other party; and upon this, the Court was asked to instruct the jury, that, if Davis was only authorized by the company to execute receipts in this form, then he was only a special agent of the company, and they would not be bound by any receipt he might give in a different form.

Upon this, his Honor instructed the jury that they could not look to this receipt or copy of a receipt at all, "as there was no original;" and further, if Davis assumed to act as the agent of the Express Company at Prospect Depot, and the company recognized his act as such agent, they were bound by his acts; and if the company gave private instructions to Davis, their agent, and such instructions were not made public, and brought home to the plaintiff, he would not be bound thereby.

It will be observed, that the receipt offered in evidence, does not purport to be either the original or a copy of the one used in this case.

It is a receipt dated 20th April, 1865, to N. Bleakley, for one bundle valued at \$60, marked A. J. Brady, Greensboro, Ga. Whether this receipt was a real transaction, and was actually given as it purports, or was only a blank filled with fictitious names, does not appear. The object in either case, was the same, merely to show the form of the receipt used by the company. There is no evidence to show that this receipt, or any one like it, was brought to the attention of the de-

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fendant in error, or his wife or agent, at the time the goods were delivered, or any intimation given to them at any time, that the company's liability was to be anything less than the law attached in such cases.

The question whether common carriers may limit their liability by notice of this character, or even by an express contract, has been much discussed, and upon it, there is a conflict of judicial opinion. The question is one of great practical importance, owing to the vastly increased number of business transactions of this character, but it need not be definitely settled in this case.

The case of *Turner v. Wilson*, 7 Yer., 340, was an action of this character, for failing to carry and deliver cotton, according to contract. In that case, a receipt was given, specifying that the dangers of the river only were excepted. Evidence was offered of a custom which was generally known, by which the carrier was to be liable only when the loss occurred from negligence or dishonesty upon his part. The Court excluded the evidence and held the carriers bound by the common law liability, except only to the extent it was limited by express contract.

In this case there is no proof that the conditions annexed to this receipt formed any part of the contract; that the defendant in error had any notice, or was in any manner connected therewith, and his Honor was not in error in excluding the evidence, although the true reason for doing so was not fully and accurately stated.

The case of *Walker v. Skipwith*, Meigs' R., 502,

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was an action to recover the value of baggage delivered to the agent of the defendants, who were the proprietors of a stage line. The defendants proved that Lyle, the agent, was instructed that "no package or parcel of any kind, should be sent upon the stage, unless it constituted a part of the baggage of a passenger, or was under the care of a passenger, except at the risk of the owner or person sending such package or article," and it was further proven that a notice of this character was posted up in the stage office, and that one Swan, by whom the package was sent, and delivered to the defendants' agent, was also informed of this. The package, however, was allowed to go upon the stage, and was lost.

The Court held that Lyle, having acted as the agent of the defendant at that office, and being authorized to transact all their business of a particular kind, he was a general agent, and that other parties were not bound by private instructions, not brought directly to their notice; and in that case, the defendant was held liable for the property. In this case, the instruction of the Circuit Court was substantially in accordance with the above principle, and we think it was not materially erroneous.

We are of opinion that the plaintiff below having waived his claim to any recovery for the notes, bonds, bills, *etc.*, contained in the boxes, and the court having told the jury that the concealment by the plaintiff's wife of the fact that the boxes contained these articles, if not made with a fraudulent purpose, would not defeat the plaintiff's right to recover for the balance of the property, there was no error in this part of the case.

We further hold that the fact that the plaintiff

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in error did not have the necessary cars or means of transportation to carry the goods after they were received, is no defense unless it was expressly stipulated at the time that such was to be the extent of their obligation. If they received the goods without any express contract, the law fixes their liability, and they were bound to furnish the transportation and carry the goods, and could only be excused by the act of God or the public enemy. This is a well settled principle of law. *Johnson v. Friar*, 4 Yer. 48; *Turney v. Wilson*, 7 Yer., 340; *Walker v. Skipwith*, Meigs, 502; *East Tennessee and Georgia Railroad Co. v. Nelson*, 1 Cold., 272.

Many authorities go further, and hold that this liability cannot be limited by notice or express contract. *Hollister v. Newland*, 19 Wend., 234; *Cole v. Godwin*, 19 Wend., 251; *Gould v. Hill*, 2 Hill., (N. Y.,) 623.

In view of the fact of the constantly increasing business of this character, and the great power exercised by common carriers over the lives and property of the citizen, we are not disposed to weaken, in any degree, the force of this rule.

4. Are the United States troops, who, it is alleged, destroyed these goods, to be regarded as "the public enemies," or "the enemies of the country," in the sense of the law, so as to excuse the plaintiff in error for the loss of the goods caused by these acts, without fault on the part of the agents of the company? His Honor, the Circuit Judge, decided this proposition in the negative, and said: "The United States army or troops were not enemies to the Govern-

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ment, or public enemies; they were public friends and friends to the Government; there was but one Government in the United States and that was the United States Government." Consequently the United States troops, under General Stoneman, a United States General, and commanding for the United States, were not the enemies of the United States Government." His Honor further told the jury "that the Confederate States never were recognized by any Government as a Government *de jure* or *de facto*. Our Supreme Court recognized them as belligerents so as to regulate criminal intent in robbery and some other felonies, but no further. The army of the so-called Confederate States was an unlawful combination, nothing but a mob, however huge its proportions may have been; consequently if the goods were destroyed by the United States troops that would not exonerate the company."

We are of opinion that the definition, as above given by his Honor, of the character of the late war, and as to the status of the Confederate Government, is not correct or accurate; but the only question of practical importance, is, was he correct in holding that the United States troops were not to be regarded as the public enemy, against whose acts the plaintiff in error did not insure. If he was in error in this, it was an error affecting the merits, and a new trial should be granted. If, on the other hand, he answered this question correctly, then the error which followed in giving a definition of the character of the rebellion—a definition which was unnecessary—was immaterial, and could not have

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prejudiced the plaintiff in error. The term "public enemy," or the "enemy of the country, has, in general, a technical legal meaning. It is understood to apply to foreign nations, with whom there is open war, and to pirates, who are considered at war with all mankind; but it does not include robbers, thieves, or rioters or insurgents, whatever be their violence." Story on Contr., 752.

In England, the term "public enemies," or "the King's enemies," as applied to the law of treason, has been held not to apply to insurgents or rebels, they not being enemies. Hawkins' Pleas of the Crown, 55.

It has been held by the Supreme Court of the United States, in a number of cases known as the Prize Cases, that the late rebellion was "a war" in the legal sense, as contradistinguished from a mere insurrection, and that as a consequence of this in the conduct of the war during its pendency, the persons living upon either side of the line dividing the contending forces, were to be regarded as enemies of the other, to the extent to authorize the forfeiture of the property of either captured by the other upon the high seas.

In the case of *Thorington v. Smith*, 9 Wallace, 1, Chief Justice Chase classes the Confederate Government among that class of cases where a foreign government, at war with our own, for instance, obtains temporary possession of a portion of our country, and establishes their authority over it, and enforces the same by military power; and referring to the Confederate Government, says: "Belligerent rights were conceded to it, and thereafter its territory, held to be enemy's territory, and for most purposes, its inhabitants held to be enemies."

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It is clear that, during the war, the parties upon each side treated each other as enemies, and this was justified by the laws and usages of war.

As an abstract proposition, it can not be doubted that the United States Government was the rightful government, and that the war was rightfully prosecuted for the enforcement of its laws; and the attempted revolution being unsuccessful, no portion of the citizens were at any time released from their allegiance to the rightful government, however they may be excused or justified in rendering obedience to the usurped government, in civil matters, so long as this obedience might have been enforced by actual military power; and we are not to be understood as announcing the proposition that, in reality, the United States Government or troops, were the public enemy of its own citizens during the progress of the war.

But in construing this contract, and determining the rights and liabilities of the parties themselves, we must give to the term "public enemy," or "enemy of the country," the meaning that attached to it at the time and place the contract was made. We have seen that at the date of this transaction both parties resided within the military lines of the "Confederate States." We have also seen that at that time, "for most purposes," the people upon each side of the dividing line were treated as the enemies of the other. So that the term "public enemy," or "enemy of the country," as understood and applied by the contracting parties at the time, included the troops of the United States Government, and that the plaintiffs in error are not, under the cir-

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cumstances, to be held as insurers against loss that might occur by the act of the United States troops.

Such was not the legal import of the contract they made, or its meaning as they then understood it.

It follows, therefore, that while in one sense the proposition of his Honor was correct, it was not the proper instruction applicable to the facts of the case. For this error alone we reverse the judgment, and remand the cause for a new trial.

There is evidence in the record, upon which the plaintiff in error might well have been held liable for their failure to carry the goods or return them before the time they are alleged to have been destroyed by the United States troops; but as this was a question of fact, they were entitled to have the case submitted to the jury upon a correct charge.

Reverse the judgment.

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REDEMPTION. *Construction of Statute.* The Act of 1865, ch. 10, s. 4, extending the time of redemption, and providing that the time, from the 6th of May, 1861, to the 1st of Jan., 1867, shall not be computed, has no application to sales made after its passage.
Case cited, *Reynolds v. Baker*, 6 Cold., 221.

FROM KNOX.

From the Chancery Court at Knoxville. Hon. O. P. TEMPLE, Ch., presiding.

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GEO. BROWN, for complainant.

E. C. CAMP, for respondent.

NICHOLSON, C. J., delivered the opinion of the Court.

We are called upon by the facts in the record to construe the Act of 1865, c 10, s. 4.

The following are the facts: Shannon Felker, being a judgment creditor of Samuel B. Henderson, had his execution levied on Henderson's house and lot, and at the sale, on the 28th of February, 1866, became the purchaser; and on the 23d of July, 1868, complainant, Wm. Henderson, being also a judgment creditor of Samuel B. Henderson, tendered to defendant, Felker, the amount of his bid and interest, and claimed the right to redeem. Felker refused to receive the money tendered, on the ground that more than two years had elapsed since the day of sale.

These facts are alleged by complainant, in his bill, and upon demurrer thereto, the Chancellor sustained the demurrer and dismissed the bill; from which decree complainant appealed to this court. If the Act of 1865, c. 10, s. 4, is construed to embrace sales of land to be made after its passage, the decree of the Chancellor in sustaining the demurrer was erroneous. This is the question to be decided. The Act of 1865, ch. 25, is entitled "An Act to provide for the limitation of actions, and for other purposes." Section 1 provides for the suspension of all statutes of limitation, from and after the 6th of May, 1861, to the 1st of Jan., 1867. Section 2

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provides that the statutes of limitation, prescribed in Pt., 3, Title 1, ch. 2, art. 3, § 2784 of the Code, shall be held not to operate from the 6th of May, 1861, to the 1st of Jan., 1867. Sec. 3 provides for the suspension of the statute of limitation, as to persons absent or residing out of the State. Section 4 is in the following words:

Sec. 4. "In all cases where real estate is subject to redemption, as prescribed in chap. 5, sections 2124 to 2137, inclusive, of the Code of Tennessee, the time between the 6th of May, 1861, and the 1st of January, 1867, shall not be held to operate or be computed, and all persons entitled to redeem such real estate shall have six months from and after the 1st day of January, 1867, to redeem the same according to existing laws."

This statute was manifestly passed for the purpose of giving legislative effect to section 4 of the Schedule to the Amendments to the Constitution, adopted in 1865, in the following words: "Sec. 4. No statute of limitation shall be held to operate from and after the 6th day of May, 1861, until such time hereafter as the Legislature may prescribe."

The public history of the State, from May 6, 1861, to the passage of the Act of May 30th, 1865, above quoted, furnishes a satisfactory reason for the adoption of the 4th section of the Schedule, as well as for the enactment of said statute. The hardships that would necessarily arise from the enforcement of the statutes of limitations, during a period of civil war, naturally suggested the propriety of suspending their operation, not only during the time of its continuance, but for a time

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beyond that sufficiently long for the restoration of civil order and law. Hence, it was enacted that the statutes of limitation should not operate from May 6th, 1861, the practical commencement of the war, until January 1st, 1867. The same reasons for suspending the operation of the statutes of limitation, suggested and enforced the propriety of enlarging and extending the time within which real estate, sold under execution, &c., during the existence of the war, might be redeemed. Accordingly, we find the provisions for the relief of both classes of hardships contained in the same statute.

But it is well settled, that whilst the Legislature might pass laws operating retrospectively on the limitation of actions, and extending the time for their operation, they could not so legislate as to rights which were already vested. Hence, it has been decided by this Court that the law giving two years for the redemption of real estate, was not a law for the limitation of actions, but a law of property. From this it follows, and was so held, that the fourth section of the Act of 1865, chap. 10, was unconstitutional, so far as it undertakes to authorize the redemption of land which was sold more than two years before the passage of the Act, and which the debtor did not offer to redeem within two years after the sale. *Reynolds v. Baker*, 6 Cold., 221. In that case the Court made only a partial construction of the section under consideration. It was held, that the section was intended to have a retrospective operation. That this holding, as to the retrospective character of the statute, was correct, is fully sustained by the provision, that the limitation should not operate from and after

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May 6, 1861. The Act was passed in May, 1865, and expressly declares that the time from and after May 6, 1861, shall not be computed. But the decision goes no further than to hold, that the section is unconstitutional, so far as it undertakes to enlarge the time of redemption in a case where the land was sold more than two years before the passage of the Act, leaving it undetermined whether the Act is constitutional where the period of two years after the sale had not elapsed at the date of the Act; or whether the Act was intended to operate as to sales of lands which might be made after the passage of the Act. It devolves upon this Court to ascertain and declare the intention of the Legislature on these questions.

It is hardly necessary for us to state that we recognize, in its full force, our obligation to seek diligently for the intention of the Legislature, and when found, to carry it out faithfully, unless, in our judgment, that intention comes in conflict with the paramount law; and, in that case, our obligation is equally clear to uphold the Constitution, and to declare its violation null and void.

We are to ascertain the intention of the Legislature by a fair interpretation of its language. The language of the section under examination, is: "In all cases where real estate is subject to redemption." This language was used by the Legislature on the 30th of May, 1865. Was it meant "in all cases where real estate is *now*, on the 30th of May, 1865, subject to redemption?" Or was it meant "in all cases *hereafter* where real estate is subject to redemption?" Either interpretation of the language is legitimate, and hence the intention can not

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be ascertained from these words alone. It is a rule of construing statutes that their language shall be so interpreted as not to bring the Legislature in conflict with the Constitution, if there is nothing in the language itself which forbids such interpretation. Taking this language by itself, this rule of construction would require us to interpret it as meaning all cases *hereafter* where real estate is subject to redemption; because the Constitution discountenances retrospective legislation, but by the same rule we are required to see if there is other language which forbids this interpretation. We may pass over the next words in the statute, namely: "As prescribed in sections 2124 to 2127, inclusive, of the Code of Tennessee," since they shed no light on the question we are discussing; but the language which follows them is important, "The time between the 6th day of May, 1861, and the 1st day of January, 1867, shall not be held to operate or be computed." This language contains the *gist* of the enactment. It is plain and unambiguous—the time from *May 6th, 1861, to January 1st, 1867, shall not be computed.* Then, most clearly, the Legislature meant to provide for cases of sales of land, which took place as long ago as May 6th, 1861, more than four years before the date of the statute. It is apparent, beyond controversy, that the language means that in all cases of lands sold where the time for redemption had commenced running before or on the 6th of May, 1861, or between the 6th of May, 1861, and the 30th of May, 1865, the date of the Act, which lands were subject to redemption, the time should cease running, and should not be computed until January 1st, 1867. We are for-

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bidden, therefore, by the plain language of the statute to interpret it as applying exclusively to sales of lands after the passage of the Act.

It can hardly admit of doubt that the Legislature assumed that they had the same power under the fourth section of the Schedule, to revive the right of redemption if it had expired after the 6th of May, 1861, and to give it continued vitality until June 1st, 1867, and for six months after, as they had to revive actions barred by the statute of limitations, after the 6th of May, 1861, and to suspend its operation until January 1st, 1867. Hence it was, that they intended to provide, that in all cases where lands had been sold, and the right of redemption had been lost, by the two years expiring after May 6, 1861, the right to redeem should be revived, and continue in operation until January 1st, 1867. And this is what they meant by the language: "In all cases where real estate is subject to redemption, the time between May 6th, 1861, and January 1st, 1867, shall not be computed."

There was urgent reason for some such relief measure, and the Legislature supposed they had accomplished it by the enactment of this statute. But, in so doing, they misconstrued their powers under the fourth section of the Schedule, and made provisions which are unauthorized by the Constitution. Upon the same authorities on which the Court, in the case of *Reynolds v. Baker*, 6 Cold., 219, held that so much of section 4, chap. 10 of the Act of 1865, as authorizes the redemption of land which was sold more than two years before the passage of the Act of May 30th, 1865, was unconstitutional and void, we hold that all of said Act which undertakes to extend the

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right of redemption in all cases of sales of lands before the passage of that Act, whether the two years had then expired or not, is unconstitutional and void. When land is sold under execution, the whole estate is vested in the purchaser by the sale. The right of the debtor is strictly a right to re-purchase, by payment or tender of the money within the prescribed time. Whenever the rights of the purchaser and of the debtor become thus vested, they are beyond the control of the Legislature, and any Act which undertakes to alter, destroy or suspend them, is unconstitutional.

But, it was competent for the Legislature, in 1865, to enact a new law of property, which would control the rights derived from the sale and purchase of lands made after its enactment. We have determined that the Act of 30th May, 1865, was intended to have a retrospective operation—but it is insisted that it may also have a prospective operation. We admit that if the language will bear the interpretation, it was the intention of the Legislature to give to it a prospective operation, it is our duty to adopt that interpretation, rather than that the whole Act should be declared a nullity.

We have construed the first member of the sentence, which constitutes the Act of May 30, 1865. We have interpreted the language: "In all cases where real estate is subject to redemption, the time between the 6th of May, 1861, and the 1st of January, 1867, shall not be computed;"—we hold it to have, necessarily, a retrospective meaning. Does it also have, by fair interpretation, a prospective meaning? In other words, was it intended to operate upon sales of land that might occur after May

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30th, 1865, and before January 1st, 1867? This must be determined by the language of the remaining member of the sentence, to-wit: "and all persons entitled to redeem such real estate, shall have six months from and after the 1st day of January, 1867, to redeem the same, according to existing laws."

The words "*such* real estate" furnish a key to the meaning of the Legislature. These words refer, unmistakably, to the *cases of real estate sales* provided for in the first member of the sentence. The two members of the sentence are connected by the copulative conjunction. The intention then was, not only to provide, that the time between May 6th, 1861, and January 1st, 1867, should not be computed, *in all cases where real estate had been sold previous to May 30th, 1865*, but also to provide, that *in these same cases* the persons interested should have the further time of six months from and after January 1st, 1867, within which to redeem, and then, the redemption to be made according to existing laws, that is as prescribed in Pt. 2, Title 2, c. 5, §§ 2124 to 2137, inclusive, of the Code, thus showing, that none but sales made prior to May 30th, 1865, were intended to be embraced, and that the existing laws were not intended to be altered or affected, except as to cases having occurred before the Act of May 30th, 1865. Our conclusion therefore, is, that the Act does not apply to land sales made after the passage of the Act, but, as to these, the existing laws were intended to remain in force.

Upon our construction of the Act of May 30th, 1865, the demurrer was properly sustained by the Chancellor, and we affirm the decree with costs.

William Girdner *et al.* v. Samuel L. Stephens.

WM. GIRDNER *et al.* v. SAMUEL L. STEPHENS.

1. CONSTITUTIONAL LAW. *Statute of Limitation. Power to divest right under.* A right to a defense complete under a Statute of Limitations, can not be taken away by a statute, ordinance of a Constitutional Convention, or amendment of the Constitution. See *Henderson v. Felker*, ante p. 271.
2. BILL OF EXCEPTIONS. *When to be made.* A bill of exceptions not made and signed at the term when the cause is tried, is a nullity, and can not be looked to as part of the record.

FROM GREENE.

In the Circuit Court. E. E. GILLENWATERS, J.,
presiding.

DEADERICK, J., having been of counsel, did not sit
in this cause.

S. T. LOGAN, for plaintiff in error, Allen, cited *Henderson v. Felker*, ante 271; Cooley on Con. Lim., 365, 369; *Wright v. Oakley*, 5 Metc., (Mass.,) 400; *Joy v. Thompson*, 1 Doug., (Mich.,) 373; *Hawkins v. Campbell*, 1 Eng., (Ark.,) 512; *Robb v. Harlan*, 7 Barr, (Penn.,) 292; *Forsyth v. Ripley*, 2 Greene, (Iowa,) 181; *McKinney v. Springer*, 8 Blackf., (Ind.,) 506; *Davis v. Miner*, 1 How., (Miss.,) 183; *Wires v. Far*, 25 (Vt.,) 41; Angell on Lim., 17, 18, 19 and note, § 488, that a statute cannot revive a right barred by limitation. That a State Convention has no authority to violate the United States Constitution, or violate contracts: *Cummings v. The State*

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of *Missouri*, 4 Wal., 316; *Union Bank v. The State*, 9 Yer.; 490; *Hazen v. Union Bank*, 1 Sneed, 119; *Tucker v. Burns*, 2 Swan, 36.

J. G. DEADERICK, for plaintiff, Walker.

R. M. BARTON, for plaintiffs in error.

INGERSOLL, for defendants.

J. T. SHIELDS, Special J., delivered the opinion of the Court.

This is an action of trespass, for an alleged assault and battery and false imprisonment, instituted by the defendant in error, against the plaintiff in error, in the Circuit Court of Greene County, on the 19th of April, 1865.

On the 12th of June, 1866, William Girdner filed a plea of not guilty.

On the 5th of June, 1865, Joseph B. Walker and Ephraim Link filed a plea of not guilty.

On the 11th of October, 1866, James Allen filed a plea of not guilty, and at the same time two other pleas, to-wit: 1st, That he was not guilty within one year next before the commencement of the action, and 2d, That he was not guilty within one year next before the adoption of the Schedule of the amended Constitution.

The defendant in error filed a demurrer to the last two pleas, which was sustained by the Court, and this action of the Court below, presents the first question that arises upon the record before us, for our consideration.

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It appears, from the face of the declaration, that the alleged trespass was committed on the 11th of September, 1861, more than three years before the suit was instituted; and by our statute of limitation of actions, Code, 2772, actions for injuries to the person, and false imprisonment, are required to be commenced within one year from the time the cause of action accrued. But it is insisted, in argument, that, by section 4 of the Schedule to the "amendment to the Constitution," adopted on the 22d of February, 1865, it is expressly provided that "no statute of limitations shall be held to operate from and after May 6, 1861, until such time hereafter, as the Legislature may prescribe." This is true, and by the Act of May 30, 1865, c. 10, s. 1, it is enacted "that no statute of limitation shall be held to operate from and after May 6, 1861, to the 1st day of January, 1867, and from the latter date the statute of limitations shall commence their operation, according to existing laws, and the time between the 6th May, 1861, and the 1st day of January, 1867, shall not be computed." And the new Constitution of the State of Tennessee, ratified March 26, 1870, Schedule, section 4, contains the following provision on the same subject: "The time which has elapsed from the 6th day of May, 1861, until the 1st day of January, 1867, shall not be computed in any cases affected by the statutes of limitation.

It is to be borne in mind that the alleged cause of action, in the case before us, accrued in September, 1861; that the statute of limitations, applicable to the appropriate action for the redress of the injury, was one year, so that by the law in force at the time, the action

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was barred, and the plaintiff in error had a vested right to plead and rely upon the protection of the statute, in September, 1862, long before the action was instituted, and long before the said amendments, the said statute and the new Constitution, were adopted and enacted.

We are, therefore, under the necessity of determining whether a convention or a legislature has the power, after a cause of action is clearly barred, and the party has a clear vested right to plead a statute of limitation in his defense, by a retrospective statute, ordinance or resolution, to divest the right to the defense and revive the right to maintain the action.

The principle in the government of England that the Parliament is omnipotent, does not prevail in the United States, though, if there be no constitutional objection to a statute, it is with us absolutely binding; but, under our written, organic law, ascertaining and limiting the powers and duties of the several departments of the Government, State and National, an act of the legislature may be void, as in contravention of the constitution.

The law with us must conform, in the first place, to the Constitution of the United States, and then to the Constitution of its particular State, and so far as it is an infraction of either, it is void. The courts of justice have the right, and it is their imperative duty, to subject every law to the test of the Constitution, first of the United States, and then of their own State, as the supreme law of the land. Every act of the legislature, contrary to the true intent and meaning of the Constitution, is absolutely null and void; and the judicial department is the proper power in the Government to de-

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termine the question. 1 Kent, 485, 486. This is an elementary and familiar principle in our Government. Nor does a convention, convened by the people of a State, stand on any higher ground. A convention, called for the purpose of amending, revising or framing a new State constitution, has no more power to violate the National Constitution than has a State legislature. "If it were so," says Judge Turley, "there would be no safety under our form of government in times of excitement." *Union Bank of Tennessee v. The State*, 9 Yerg., 490. The power of the judiciary to bring to the test of the Constitution of the United States the action of a convention, has been frequently exercised. *Cummings v. Missouri*, 4 Wallace, 595.

It is clear, then, that the action of the two conventions and the Act of the Legislature upon the question under judgment, stands upon the same ground, and are in precisely the same category with reference to their validity under the Constitution.

We proceed then, in the exercise of our unquestionable right, and in the discharge of our most solemn and bounden judicial duty, to determine the question whether the two conventions and the Legislature had the power, under our fundamental laws, to deprive the plaintiff in error of the defense which had accrued to him under the law of the land, as it was clearly in force at the time.

In view of the frequency with which this and analogous questions have come before the judicial tribunals of the country, and of the elaborate and exhaustive discussion which they have undergone; and holding it our solemn duty to be guided by those principles

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of interpretation and construction which the sages of American constitutional law have adopted and applied, and that their conclusions are to be received with the highest respect, we shall not attempt any protracted discussion, but content ourselves with stating and declaring the law as it has been handed down to us by the great founders and expounders of the Constitution who have gone before us, and whose memory is revered for their purity of purpose, their love of constitutional liberty, far-seeing wisdom, and profound learning.

A statute retrospective in its character and operation, directly affecting and divesting vested rights, is very generally considered, in this country, as founded on unconstitutional principles, and consequently inoperative and void. 1 Kent, 453, citing *Osborne v. Huger*, 1 Bay, 179; *Ogden v. Blackledge*, 2 Cranch, 272; *Bedford v. Shilling*, 4 Sergeant & Rawle, 401; *Society v. Wheeler*, 2 Gallison, 105; *Colony v. Dublin*, 32 (N. H.), 432; *Torry v. Corliss*, 33 (Maine), 333; and numerous other authorities.

"It seems to be the general opinion," says Judge Story, 2 Com. on Con., § 1399, "fortified by a strong current of judicial opinion, that since the American Revolution, no State government can be presumed to possess the transcendental sovereignty to take away vested rights of property."

"It is to be deduced as a correct conclusion from the decided cases," says Sedgwick in his excellent work on statutory and constitutional law, "that a statute which, without some controlling public necessity, and for public objects, seeks to interfere with vested rights of private

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property, is beyond the true limit of legislative power." p. 177.

The power to pass such laws has been almost universally denied to exist in this country, under our written constitutions, interpreted according to their spirit and true meaning; and such is also the sentiment and opinion of the philosophical and text writers of other countries. Puffendorf says, "a law can be repealed by the law-giver; but the rights which have been acquired under it while it was in force, do not thereby cease." The same doctrine is to be found in Bracton, Lord Bacon, in Bacon's Abridgement, and was a maxim of the civil law. It is to be found in many European codes of law; and in England, where there is no absolute restriction upon the legislative department of the government, it has been adhered to with great strictness.

The principle being well settled and established, the next inquiry is, does the case before us come within it? A statute which takes away or impairs *any vested rights*, is retrospective and retroactive. *Society for Prop. of Gospel v. Wheeler*, 2 Gallison, 105. And we hold, both on authority and principle, when a cause of action is barred by a statute of limitation, in force at the time the right to sue arose, and until the time of limitation expired, that the right to rely upon the statute as a defense is a vested right that can not be disturbed by subsequent legislation.

Judge Cooley, in his work on Constitutional Limitations, 369, says: "As to the circumstances under which a man may be said to have a vested right to a defense, it is somewhat difficult to lay down a comprehensive

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rule. He who has satisfied a demand can not have it revived against him; and he who has become released from a demand by the operation of the statute of limitations, is equally protected. In both cases, the right is gone; and to restore it would be to create a new contract for the parties—a thing quite beyond the power of legislation.”

The power of the Legislature to regulate the remedy, or to extend the time of limitation before it has completely run, are questions not involved in this case, and stand upon different principles. The question is, as to the power to extend the time, when the cause of action is already barred; and it has been uniformly held, so far as our researches have extended, that it can not be done. In the case of *Woart v. Winnick*, 3 N. H. Rep., 473, it was expressly held that an Act of the Legislature repealing An Act of limitation, was, with respect to all actions pending at the time of the repeal, which were previously barred, null and void. This case, however, was decided under a provision in the Constitution of that State. But in many other cases, in the States of Massachusetts, Michigan, Arkansas, Mississippi, Pennsylvania, Iowa, Indiana and Vermont, cited by Mr. Angel in his highly esteemed and authoritative work on Limitations of Actions at Law, the same general doctrines seem to have been held. Ang. on Lim., 22, 23, note. Although our own courts seem not to have been called upon, heretofore, to adjudicate this precise question, yet they have uniformly held that a claim barred by a statute of limitation is deemed in law to be extinguished and discharged. 9 Yerg., 543; and consequently, to re-

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vive it is to interfere with a vested right. In some of the cases, and also in some of the text writers, as in Cooley, 365, the subject matter of the controversy and of the application of the doctrine, is mentioned as property; in others, the rule is stated as being applicable to all demands that are barred. There can be no difference in principle whether it is a right to recover land or personal property *in specie*, or damages for the breach of a contract, or for a *tort*. We therefore hold section 4 of the Schedule of the amended Constitution of 1865, and section 4 of the Schedule of the new Constitution of 1870, and the Act of May 30, 1865, c. 10, sec. 1, so far as by their terms and effect they authorize the institution of suits to recover on demands, whether arising *ex contractu* or *ex delicto*, that were, at the times of these several enactments and resolutions, already barred by existing laws, to be null and void.

It is further insisted that the alleged cause of action originated during a civil war, whereby the Courts were closed, which continued during the whole time of the limitation, and for that reason the statute did not run. This is a question, which, to our knowledge, has never received in this country any direct judicial consideration, and as to which there appears to be some conflict of opinion among the English authorities. "It seems agreed," we read in Bacon's Abridgement, vol. 6, 395, Bouvier's ed., "that there being no Court, or the Courts of Justice being shut, is no plea to avoid the statute of limitation; as where, after the civil war, an assumpsit was brought, and the defendant pleaded the statute of limitation; to which the plaintiff replied, that a civil war had broke

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out; and that the government was usurped by certain traitors and rebels, which hindered the courts of justice, and by which the Courts were shut up; and that within six years after the war ended, he commenced his action; this replication was held ill, for the statute being general, must work on all cases which are not exempted by exception." In *Guion v. Bradley Academy*, 4 Yerg., 253, and in *Cocke & Jack v. McGinnis, M. & Y.*, 361, 7, in which, on other grounds, it was insisted that the statute had not run, it was held that nothing was better settled than that the Courts can make no other exceptions to the enacting and barring clauses of the statute, but such as are made by the Legislature, for it would be legislating to do so. And such seems to have been the opinion of our legislative bodies from the times of the civil commotions and disturbances of the Revolutionary war down to the present time, for by a very old statute, to be found in 1 Scott's Laws of Tennessee, 277, a provision is made for the suspension of the statutes of limitation during "the intrusion of a destructive war;" and it is further to be seen by a provision in the same statute, that it was the sense of the body that enacted that statute, that it had no power to revive a cause of action that was already clearly barred. During the continuance of the war, other and similar laws were passed, all to be found preserved in the same venerable collection of our early statute laws.

But we do not feel ourselves called upon to decide the question at present, as it does not appear in this record that the Courts were closed against the institution of process in the years 1861 and 1862, and this could not, in fact, have been made to appear, as we judicially know that such was not the fact.

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The demurrer to the plea of the statute of limitations, filed by Allen, having been sustained, the case was submitted to a jury, on the several pleas of not guilty, who found for the plaintiff below, and assessed his damages at two thousand dollars. A rule to show cause why the verdict should be set aside and a new trial granted, was entered by the plaintiffs in error, and continued until the next term of the court. This rule, at the next term, was made absolute as to Link, but discharged as to the other plaintiffs in error, and judgment against them was rendered on the verdict of the jury. A bill of exceptions was filed, at this term, by the parties against whom the judgment was rendered, and they prosecute this appeal in the nature of a writ of error.

Our holding upon the question of the statute of limitations, reverses the judgment as to Allen, who alone pleaded that defense. But as to the defendants, Girdner and Walker, we are compelled to affirm the judgment. We cannot regard the bill of exceptions as a part of the record. It was not made and signed at the term when the cause was tried, and as is now well settled, it could not be done afterwards, so as to make it a part of the record.†

We reverse the final judgment as to Allen, and also the judgment sustaining the demurrer to the plea of the statute of limitations, and overrule the same; and remand the cause as to him, to the Circuit Court of

† See *Garrett v. Rogers*, *post*—; *Nave v. Nave*, *post*—; *Mynatt v. Hubbs*, *post*—; *Massengill v. Shadden*, *post*—. REP.

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Greene county, with leave, to the defendant in error, to reply to the plea, which, when at issue, will be submitted to another jury, together with the issue on the plea of not guilty.

Affirm the judgment against Walker and Girdner.

MILLY EVANS, in error, v. ELIJAH BUCKNER.

ERROR. *Charge of Judge. Ratification.* Where there was evidence to prove the ratification by the principal of an unauthorized exchange made by an agent, by acceptance of the property taken in exchange, and the Court was requested to charge that if the plaintiff accepted the property with full knowledge of the facts, and kept it, &c., that would be a ratification; but the Court refused, and charged that if a party ratifies a void contract it becomes binding on him. It was held error, for the refusal, and the charge given is calculated to mislead the jury.

FROM COCKE.

In the Circuit Court, JAS. P. SWANN, J., presiding.

R. MCFARLAND, for plaintiff in error.

BARTON & MCFARLAND, for defendant.

TURNEY, J., delivered the opinion of the Court.

An action of replevin was commenced and prosecuted by defendant in error, against the plaintiff in error, for

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the recovery of a dun colored or clay-bank mare. The declaration is in the form prescribed by the Code, to which there is a plea of not guilty.

A trial was had, verdict and judgment for defendant in error, and an appeal to this Court.

The substantial facts are, that Buckner having gone into Kentucky during the war, his wife placed the mare in the possession of Stephen Franklin, (colored,) as he states, "to try to keep her from being taken by the soldiers." "A man by the name of Philips, a corn agent in the rebel army, proposed to trade for her or swap for her; witness refused. He kept after the witness for a swap for a week or more, and finally told witness he had as well trade as they would take her any how. Witness became alarmed for fear he would lose her, and after reflection, concluded the best he could do was to make the swap. Witness then went to Mr. John Shutzer and told him to make the trade for him, and he did so. He swapped for another mare, got fifty dollars in Confederate money, &c."

The gray mare, swapped for, was kept by witness for some time, when plaintiff's wife being in need of a horse to go to mill, came and got her and took her home, and kept her, and when the plaintiff came home he retained her in possession, and has been using her ever since, and still has her. She is worth as much or more as the mare the plaintiff lost. John Shutzer proves: "The plaintiff, since he came home, has been using and keeping said mare as his own property and still has her."

M. J. Mimms proves: "The mare in controversy

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was given to plaintiff in error by her brother; that she had no knowledge where the mare came from."

The counsel for plaintiff in error asked his Honor, the Circuit Judge, to charge the jury: "That if the plaintiff accepted the gray mare with a full knowledge of the facts, and kept and used her and refused to give her up, that this would be a ratification of the contract."

The court refused, but charged the jury in general terms: "If after a contract is made which is absolutely void, yet if the party ratifies such a contract it becomes binding upon him and he could not recover. So in this case, if the plaintiff ratified the contract made by Stephen, he would be bound by such ratification, although you may be convinced from the proof that the contract was originally void."

This was error. The refusal of his Honor to charge as requested, without notice of the matter of request in his charge, was calculated to mislead the jury as to what was required to constitute a ratification of the acts of an agent, and to impress them with the conviction that ratification could only be in express terms, and could not be implied from circumstances.

The term ratification has a legal signification which it was the duty of the Court to have explained to the jury. He should have charged the jury, that if Buckner, knowing the facts, received the property, that is, the gray mare swapped for by Stephen, and applied her to his own use, such receipt and application would be a ratification of the act of Stephen.

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Ratification is an agreement to adopt an act performed by another for us, and is either express, or implied from the acts of the principal. Bouv. Law. Dict.

Where any one contracts as agent without naming a principal, his acts inure to the benefit of the party, although at the time uncertain or unknown, for whom it shall turn out he intended to act, provided the party thus entitled to be principal ratify the contract. And generally, if the principal receive and hold the proceeds or beneficial results of the contract, he will be estopped from denying an original authority or a ratification.

And if a party does not disavow the acts of his agent as soon as he can after they come to his knowledge, he makes these acts his own. 1 Par. on Contr., 49, 50; 6 Cold., 203.

“The decision of this question being conclusive of the case in this court, we deem it unnecessary to notice other questions made in argument.

Judgment reversed and cause remanded.

JOHN D. RILEY, Plaintiff in error, v. BENJAMIN S. BUSSELL.

1. JUROR. *Suitors.* Code, 3988 and 4010 construed together. Section 3988 of the Code forbids the appointment of a juror who has a suit pending in the Court at the term to which he is nominated. Section 4010 makes a cause of challenge that the juror has a cause pending for trial at the term; these are to be construed together.

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2. *SAME. Policy of § 3988. Construction.* In view of the policy of preventing corrupt combinations among jurors, the restriction is to be favorably construed.
4. *SAME. Challenge. Suitor.* It is a good cause of challenge, that a juror had a cause pending, not for trial at the term. Code construed §§ 3988, 3999, 4009 4010.

FROM HAWKINS.

Appeal in error from the Circuit Court, E. E. GILLENWATERS, J., presiding.

JAMES T. SHIELDS, for plaintiff in error.

No counsel appeared for defendant.

NELSON, J., delivered the opinion of the Court.

It appears from the bill of exceptions, that on the trial of this cause, the defendant inquired of the jury if any of them had suits pending in the court in which the trial was had, and six of the said jurors answered that they had suits pending in said Court, but not for trial at that term; and thereupon, the defendant moved the Court to discharge the said six jurors so having suits pending, and to appoint jurors in their stead free from exception; but the Court refused so to do, and the jurors so having suits pending, were allowed to remain on the jury, and try the cause. To this action of the Court the defendant excepted, and the question before us is whether this was error.

The right of trial by jury is as old as the common law in England, and is supposed by Worthington, in his *Treatise on Juries*, 27 Law Lib., 5, 6, to have

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been derived there from Roman jurisprudence. However greatly it may have been abused, it has been, and is, regarded as an essential element of public liberty. In the Declaration of Independence it is charged against the King that he had, in many cases, deprived the people of trial by jury; and the right, in civil and criminal cases, was afterward secured in our National Constitution. In all our Tennessee State Constitutions, it has been declared that the right of trial by jury shall remain inviolate, and the Legislature, in prescribing from time to time, the qualifications of jurors, directing the mode of their appointment or selection, and securing the rights of challenge, has endeavored to preserve the purity of this cherished institution, and to secure so far as practicable, the greatest impartiality in the administration of justice. It is our duty as a co-ordinate department of the Government, to give effect to the legislative will by fair and reasonable interpretation.

The provisions in the Code, so far as they relate to the question raised in this case, are, that the County Court of such county shall, at the first session after each term of the Circuit Court, designate twenty-five good and lawful men to serve as jurymen at the next succeeding court, that one of the jurors thus designated shall reside in each civil district into which the county is divided; that the Justices from each district may designate the jurymen from that district; that no court shall appoint any person to serve as a juror more than one time in each period of twelve months; and that, in making the selection, such persons only as they know, or have good reason to believe, are esteemed in

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the community for their integrity, fair character and sound judgment, shall be selected. In section 3988 it is declared that "no court shall appoint any person who has an action pending in the court at the term to which he is nominated." By section 3996 it is provided that "the Sheriff in summoning jurors under the foregoing provisions, when the selections devolve upon him, shall be governed by the rules herein before prescribed for the regulation of the County Court in selecting jurors;" and in the succeeding section, a willful neglect on the part of the Sheriff of these rules, and knowingly electing incompetent or exceptionable jurors, is declared a contempt of the court, and punishable accordingly. Section 4009 provides that "either party to an action may challenge, for cause, any person presented as a petit juror, in either a civil or criminal proceeding, who is incompetent to act as a juror under the provisions of the foregoing article." And, in section 4010, it is provided that "any person who has a suit then pending for trial, at the same term of the court, or who has an adverse interest in a similar suit, involving like questions of fact, or with the same parties," may also be challenged, for cause. As jurors are entrusted with the determination of questions of fact, in all trials relating to the lives, property or reputation of the people, it is manifest that the intention of the Legislature was not only to secure, if practicable, a high degree of integrity and intelligence, but to guard the jury box, so far as possible, against all extraneous influences that might be calculated wrongfully to bias their judgment, or affect their impartiality.

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The reasons for disqualifying persons who have suits pending was, evidently, to prevent any combination between the jurors to render verdicts in favor of each other; and this reason would be just as applicable to cases pending, but continued, as to cases pending, which may be continued. On the supposition of a corrupt understanding between parties litigant to favor each other, it is easy to conceive that an arrangement could be made as readily in regard to the next as an existing term of the court; and it is not improbable that, in times of great public or party excitement, such gross perversions of the noblest objects of the jury trial have occurred, in cases of great magnitude, and especially such as involve the discretionary ascertainment of large damages. Guided by what we believe to be the spirit and meaning of the statute, and looking to the ordinary rules of construction, we are of opinion that sections 3988 and 4010 should be constructed together, and that the expression in the latter, "who has a cause pending for trial, at the same term of the court," means, and was intended to mean, precisely the same thing as the expression in the former section, "who has an action pending in the court to which he is nominated. In this view, it was immaterial whether the causes of the six jurors had been continued or not; and we hold that his Honor erred in not sustaining the objection as to their qualification.

The evidence set out in the record does not fully satisfy us of the plaintiff's right to recover in this action of forcible entry and detainer; but we are not prepared to say that there is no evidence to sustain the verdict; and in view of a long-established rule of this

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Court, we abstain from invading the province of the jury and weighing the testimony. On the ground alone that the objection to the qualification of the jurors was not sustained, let the judgment be reversed, and the cause remanded for a new trial.

JOSEPH WILLAMS, in error, v. THOMAS GODFREY.

JUROR. *Challenge for cause. Opinions.* In a civil case, either party has the right to examine each juror offered, to ascertain whether he has formed or expressed an opinion touching the merits of the case.

FROM GRAINGER.

In the Circuit Court, J. P. SWANN, J., presiding.

BAXTER & CHAMPION, for plaintiff in error.

GEO. ANDREWS, J. M. MEEK and L. A. GRATZ, for defendant.

TURNERY, J., delivered the opinion of the Court.

In an action of trespass by the defendant in error against the plaintiff in error, during the impanneling of a jury, the counsel of plaintiff in error asked "for leave to poll each juror, to see whether they had formed and expressed an opinion touching the merits of the case." The motion was overruled by the Court. The refusal

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of the Circuit Judge to permit the counsel of the plaintiff in error to test the competency and qualifications of jurors by questions as to their having formed and expressed opinions upon the merits of the case, and as to the basis of such opinions, if formed or expressed, was error.

Either party has the right to examine a juror touching such opinions. His adversary has the right, if the fact is not fully shown by the examination in chief, to show that the offered juror has no opinion which, in law, and under the rules of practice, disqualifies him. We, like the counsel of both parties, have been unable to find any adjudication upon the question; therefore, we adopt the custom of the courts and profession, which we understand to be of almost daily use, and declare the law to be, that such questions as to the opinions of the merits of a cause, the answers to which will qualify or disqualify a juror, are competent and strictly proper. It is insisted in argument that the sections of the Code, 4002 to 4008, (both inclusive,) do not allow the rule we have indicated, and that a jury can only be challenged for the causes specifically set out in said sections. We can not think this construction of the statutes a correct one. By section 4007, it is provided: "The Court may discharge a grand or petit juror from service, who does not possess the requisite qualifications, or who is exempt or disqualified from such service, *or for any other reasonable or proper cause, to be judged of by the Court.*"

The terms, reasonable or proper cause, mean such causes as will probably prevent, to the party challeng-

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ing, a fair and impartial trial; prevent the juror from looking alone to the evidence for his verdict. It is the spirit and meaning of the law, that every man shall have a fair and unbiased investigation of his rights or claims of right, that jurors shall be removed from such extraneous causes as may influence them against evidence to arrive at a verdict. The common law secures these qualifications. Jurors may be challenged *propter affectum*, for suspicion of bias or partiality; this may be either a principal challenge or to the favor. * * * Challenges to the favor are, when the party hath no principal challenge, but objects only some probable circumstance of suspicion, as acquaintance and the like. 3 Bl. Com., 363, m. Of course, the circumstances of suspicion, partiality, bias, &c., must be such as the law will hold to influence the mind or honesty of the juror, and not such as will readily yield to proof legitimately obtained.

Whether the bias is of the one character or the other, is the more satisfactorily and reliably ascertained by an appeal to the conscience of the juror upon oath. If the rule we have declared were to be rejected, fraud and prejudice would soon destroy the reason for the institution of trial by jury.

The meaning of the statute, that the Court is to judge "of any other reasonable or proper cause," is, that the Court shall exercise a sound, legal discretion under the rules here laid down.

Judgment reversed, and cause remanded.

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THOS. I. DOUGHERTY *et als* v. JOHN B. SHOWN, *et als*.

1. PLEADING. DISCONTINUANCE. *Defendants. Who are.* A defendant on whom process has not been served, is not affected by a demurrer, filed by others, describing themselves as "the defendants." He may have a discontinuance ordered for a hiatus in the process as to him.
2. PRACTICE. *Witnesses. The Rule.* A party in a civil case, making affidavit of its necessity, may demand, as of right, that the witnesses be put under "*the rule.*"
3. SAME. *Jury sending back.* A jury having assessed several damages against different defendants, cannot be sent back with the instruction that the payment of the lesser damages will satisfy the larger. If they are, and then find a verdict against all for the larger sum, it will be set aside.
4. EXEMPLARY DAMAGES. Exemplary or vindictive damages, though clearly wrong in theory, are established as the rule in Tennessee.

FROM JOHNSON.

In the Circuit Court of Johnson County. The transcript does not show who was presiding as Judge, when the motion to discontinue was disposed of. J. P. SWANN, J., presided at the trial.

The motion to discontinue was made by only one defendant.

H. H. INGERSOLL, for plaintiff in error.

R. M. BARTON and E. C. CAMP, for defendants.

J. T. SHIELDS, Special Judge, delivered the opinion of the Court.

In this case, we hold that the motion entered by the defendant, Cabell, to discontinue the cause as to him, should have been allowed. It is conceded that as to

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him the process was not regularly continued from term of term; but it is insisted that the lapse, or want of continuance, is aided by a demurrer, which was filed in the cause. It appears that at the time the demurrer was filed, the defendant, Cabell, was not before the court, either by personal service of process, or otherwise.

The demurrer was filed by several of the defendants, but we do not hold, that because the word "defendants," in the plural, is used, it is necessarily implied that it was filed by all the defendants. Such a rule of construction would be exceedingly harsh, and often work intolerable hardship and wrong. It may well be presumed *prima facie*, and until the contrary be made to appear, that it is the pleading of all the defendants upon whom process has been served; but, on the other hand, it will not be presumed that it is the pleading of a party upon whom process has not been served. To make it the appearance of such a defendant, it must appear clearly, on the face of the pleading, that he joins with the other parties in filing it.

We further hold that the Court erred in not enforcing "the rule," on the application of the plaintiffs in error. An affidavit was made, showing that justice required that the witnesses "be put under the rule," and examined separately. This application should have been granted; for, as we have held, during the present term of this Court, it is always the right of a party to demand this rule, and the duty of the Court, on a proper application, to grant it.†

† See *Rainwaters v. Elmore*, post —.

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The jury having retired to consider of their verdict, returned, *and requested the attorney of the plaintiff* below to state to the Court that they desired "further instructions," which were given. The jury again retired, returned, announced that they found all the defendants guilty; that they assessed eight hundred dollars damages against the defendants, Miller and Dougherty, jointly, and five thousand dollars damages against the defendants, Hays, Cabell and Wagner, jointly. The Court then directed the jury to take their seats in the jury-box, as their services were needed. The attorney of the plaintiff below, then objected to the verdict; and he remarked that the jury had not understood the charge of the Court; nor what was the effect of their verdict; and he requested the Court to permit the jury to reconsider, under an instruction, that a satisfaction of the judgment on one assessment of damages, would operate in law as a satisfaction of both.† Notwithstanding the defendants below interposed an objection, the Court said that if the jury had not understood him, he would state the law to them to be, that a satisfaction of the smaller judgment would operate to preclude the collection of the larger, and the jury saying that they had not understood the instructions of the Court, were permitted again to retire, and they then returned a joint verdict against all the defendants.

Now, can it be said that this was the verdict of the jury? We think not. They had come to their conclusion, and had agreed that the facts demanded that two of

† See *Davis v. Chance*, 2 Yer.. 94; *McDaniel v. Waggoner*, 1 Tenn., 252; Saund. R., 207-207a., n. 2.

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the defendants should pay eight hundred, and the others five thousand dollars. It was not right, in their opinion, that the former should pay more than eight hundred dollars, and it was their province, on the facts proved, to determine that question. The effect of such a separate assessment of damages on the pecuniary interests of the plaintiff, was not a question to be considered in ascertaining what amount of damages each defendant should pay, where, in the opinion of the jury, separate damages should be assessed. Such an element should not enter into the verdict of a jury. Sound morals, common justice, and the law of the land, alike prohibit it. The verdict of the jury as originally returned, was their deliberate view of the justice of the case, and no one had any right to interfere with their conclusions. No one is authorized to assume that a jury has not understood the instruction of the Court, when their verdict is legal in form and substance; and it is the imperative and solemn duty of the Court to see that such a verdict is entered as it is rendered. The verdict upon which the judgment was pronounced in this cause, was not the verdict of the jury. And we hold that any such interference on the part of the Court, as well as re-assembling the jury, and directing them again to retire after they have once rendered their verdict, and been discharged, is error, for which this Court will reverse the judgment, and award a new trial.

It is argued before us with much ability and force of reasoning, that the ruling of the Court below, as to the proper measure of damages in an action of an assault and battery, and false imprisonment, was erroneous; that

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the damages given should be by way of compensation alone, for the injury actually received or loss sustained, and that vindictive or exemplary damages should not be allowed. It is obviously true that a man should not be compensated for that which he never had, or for any injury that was never done him, and that, on the other hand, a man should not pay or suffer for a thing that he has not done. We should be much inclined to give our assent to the propositions of the plaintiffs in error, were that question an open one in this State. But such is not the case. The doctrine that, in cases where the elements of fraud, malice or gross negligence or oppression, enter into the injury, the interest of society, and the aggrieved party are blended; and that the jury in *such* cases may award exemplary damages, has been too long enforced in our lower Courts, and too often construed by this Court, to be now disturbed.†

The judgment will be reversed as to Casper T. Cabell, and his motion to discontinue will be allowed.

The judgment will also be reversed as to the other plaintiffs in error, and the cause remanded for another trial.

† See *Johnson v. Perry*, 2 Hum., 569; *Wilkins v. Gilmore*, *Id.*, 140; *Polk v. Fancher*, 1 Head, 336; *Byram v. McGuire*, 3 Head., 530; *Smith v. Eakin*, 2 Sneed, 436; *Carter v. Peck*, 4 Sneed, 208.

Martha Creamer v. Hiram Ford.

MARTHA CREAMER v. HIRAM FORD.

ERROR. *In forma Pauperis. Oath.* The oath of plaintiff in error as a pauper, "that she is entitled to have this cause and the judgment against her in the Circuit Court of Greene county reversed, and that the amount of said judgment is within the jurisdiction of the Court, is good. Code, § 3192.

REPLEVIN. *Bond.* Bond in replevin for costs only, is no compliance with the Code, § 3377, and on a rule for security the suit may be dismissed.

PRACTICE. *Rule for security. Error in waived.* If a rule be given for new security absolutely, the party can not object that the rule does not give the option to justify, unless he appear and offer to justify his security.

CLERICAL ERROR. This Court will correct a clerical mistake by the context and sense.

REPLEVIN BOND. *Plaintiff and sureties.* plaintiff in replevin is liable to judgment without reference to the conditions of the bond. The liability of the surety alone is affected by the bond. Code cited, §§ 3191, 3192, 3377, 3390, 3391.

FROM GREENE.

Replevin in the Circuit Court of Greene, R. R.
BUTLER, J., presiding.

The cause being brought to this Court by writ of error sued out *in forma pauperis*, a motion was entered to dismiss for insufficiency of the affidavit, in that part of it stated in the opinion.

R. MCFARLAND and R. MCKEE, for plaintiff.

H. H. INGERSOLL, for defendant.

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NELSON, J., delivered the opinion of the Court.

The motion to dismiss the writ of error in this case is overruled. The oath of the plaintiff "that she is entitled to have this cause and the judgment against her in the Circuit Court of Greene county, reversed, and that the amount of said judgment is within the jurisdiction of the Court," is a substantial compliance with the form prescribed in the Code, § 3192.

But the prosecution bonds, executed in the Court below, on the 25th of February, 1860, when this action of replevin was commenced, and under rule of the Court in the progress of the cause, on the 13th of February, 1861, are for costs only, and do not meet the requirements of the Code, which explicitly directs that the bond shall be in double the value of the property, payable to the defendant, and conditioned to be void if the plaintiff abide by and perform the judgment of the Court in the premises. § 3377. In all such cases, this is indispensable to render the security liable for anything more than costs, and extraordinary powers are given to the Court to remedy the defect. § 3392. As the action of replevin, either before a Justice or in the Circuit Court, is a summary proceeding, and the possession of the property in dispute may be transferred from one party to the other, at the commencement of the suit, we can not too strongly reprehend the practice which seems to prevail of neglecting to require the full security directed by the Statute. This is more important where the writ is issued by a Justice than by a Clerk, as a

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remedy is given against the latter by section 3393, but no express remedy is given against the former; and in many cases the property of the true owner may be taken from him without any effectual redress.

Although the bonds in this case were for costs only, there is no error in the judgment rendered against the plaintiff by the Circuit Court. At the October Term, 1865, a rule was obtained against her, upon the affidavit of the defendant, to give other and better security, on or before the second day of the next term. While the usual form in such an order is to allow the party to justify or give new security, the order may be made in either form, under the Code, section 3191, which provides that "any person required by law to give security for costs, may, at any stage of the case, be ruled to give such security, if it has not previously been done, or to justify or give new security on sufficient cause shown." If the plaintiff desired to pursue the latter alternative, she could have appeared in obedience to the notice served upon her, and might have offered to justify her security, but did not do so. The rule was made absolute at the succeeding term, and the further decision of the case *suspended*—the word "pending" used in the record being evidently a mistake. At the next term it was ordered that the defendant recover of the plaintiff the damages he had sustained, and it was directed that, at the succeeding term, a jury should come to enquire thereof. A jury was impaneled and sworn accordingly, and judgment rendered declaring that defendant is entitled to possession of the horse if he may be had, with damages for his detention and costs, and, if he may not be had, then

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against the plaintiff and her security, without naming him, for the value of the horse, with interest thereon, damages for detention, and costs. The surety is not before this Court, and no action can be taken here for his relief, but, as to the plaintiff, the judgment is not erroneous, and might have been rendered without any prosecution bond whatever. She failed to prosecute her suit; and without any reference to such bond, it is provided in the Code, that, "if the issue is found for the defendant, or the plaintiff dismisses or fails to prosecute his suit, the judgment shall be that the goods be returned to defendant, or on failure, that the defendant recover their value with interest thereon, and damages for the detention; the value of the property and the damages to be assessed by the jury trying the cause, or where the plaintiff fails to prosecute by a jury impaneled for the purpose," 3390. The record shows that in obedience to the mandate of the writ, the sheriff took the horse out of defendant's possession, and delivered him to the plaintiff; and, so far as she is concerned, the judgment is affirmed.

ELBERT DAY, in error, v. MARTHA J. MCGINNIS, Administratrix of JAMES MCGINNIS, deceased.

1. EVIDENCE. *Parties as witnesses.* The Act of 1867-8, c. 75, allowing persons interested in causes to be witnesses, did not take effect until it was put in operation by the Act of December 17, 1868, c. 7.
2. SAME. *Declarations.* Evidence of what a deceased party said is not admissible to show that he had just been to a particular place and performed a particular act.

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3. **STATUTE.** *Takes effect when.* *Adjournment without day.* An adjournment to a day certain, to hold a special session, does not put acts passed in operation until forty days from end of the latter session.

FROM HANCOCK.

Appeal in error from the Circuit Court, JAMES P. SWANN, J., presiding.

On the trial, a witness proved that the defendant came to the house of plaintiff and required him to take his gun and deliver it to one Perry Mills; and to show that he did so deliver it, the witness was allowed to state that he started out with the gun, saying that he was going to deliver it to Mills, and that he returned without the gun, and said when he returned that he had delivered it to Mills.

J. T. SHIELDS, for plaintiff in error.

No counsel for defendant.

TURNEY, J., delivered the opinion of the Court.

There is error in this record. The suit was commenced before a Justice of the Peace, from whose judgment an appeal was had to the Circuit Court of Hancock County. The subject matter of the suit is a rifle gun. The cause was tried in the Circuit Court on the 18th day of May, 1868. On the trial of the cause, the defendant in error offered to examine John McGinnis, a son of herself and of her intestate; the testimony was objected to, and the objection overruled. This was error. The

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Act of the General Assembly making competent as witnesses persons in interest, was passed March 13, 1868. There is no time provided in the Act for its going into operation, and there had been no adjournment, without day, of the Legislature passing the Act.† On the 17th day of December, 1868, the same Legislature passed an amendatory Act, fixing the time at which the Act of the 13th of March should go into operation. The trial of this cause was between these periods. By section 162 of the Code, it is provided, "no general law passed by the General Assembly shall go into operation, or have any binding effect until the expiration of forty days after the adjournment without day, unless otherwise provided for in the act itself." It follows the witness was clearly incompetent.

The defendant in error was permitted to prove, over the objection of the plaintiff in error, that the intestate (in the absence of the plaintiff in error) said, on his return home, that he had delivered the gun to Perry Mills, to whom he had been directed by plaintiff in error, to deliver it. The declaration was no part of the *res gestæ*; was wholly disconnected with the plaintiff in error, does not fall within the class of cases in which the declarations of a party are admissible as explanatory of his purpose and motive, and is obnoxious to the objection that the declarant was making evidence for himself. In admitting this testimony, the Circuit Judge erred.

For these reasons the judgment is reversed, and the cause remanded for a new trial.

† On the 16th of March, 1868, the General Assembly adjourned by joint resolution of the two Houses, until the 9th of November, 1868.—REP.

George Wolfe v. Henry Tyler, etc.

GEORGE WOLFE, Plaintiff in error, v. HENRY TYLER,
Surviving Partner of LEE JESSE & Co.

1. PLEADING. *Nominal Plaintiff.* If a person sue as the bearer of a note for bank notes, not payable to bearer, and not assigned, the want of the proper payee as nominal plaintiff, is matter of form, not in issue on *non est factum*, cured by a verdict, and not fatal in arrest of judgment or on error.
2. ERROR. *Bill of exceptions.* Where a bill of exceptions is taken with no exception to the charge of the Court, it will be presumed on error that all proper instructions were given.
3. Statutes cited as carried into Code, 1783, c. 57; 1786, c. 4; 1801, c. 6; 1802, c. 9; 1825, c. 29, s. 3. Code cited §§ 1956, 1967, 4516, 2874, 2865, 2795, 2858.

FROM HANCOCK.

From the Circuit Court, J. P. SWANN, J., presiding.

J. T. SHIELDS, for plaintiff in error.

R. M. BARTON and S. T. LOGAN, for defendant.

NELSON, J., delivered the opinion of the Court.

On the 29th January, 1861, Peter Wolfe and George Wolfe, executed their note, payable one day after date, to James Drennen, for one hundred dollars, in bank notes. This suit was brought in the Circuit Court of Hancock County, on the 16th August, 1866, in the name of Henry Tyler, surviving partner of the firm of

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Lee Jesse & Co., against Samuel Turnmire, administrator of Peter Wolfe, deceased, and George Wolfe, to recover the amount of the note; and a declaration was filed in substantial conformity to the Code, in which the note is described; and it is averred that "the plaintiff afterwards became and still is the lawful bearer thereof." Profert having been made of the note, it was set out upon oyer, in the plea of George Wolfe, who pleaded that "the said note or writing, obligatory, sued on in this case, is not his act and deed," and concluded with a verification. The plaintiff replied that "the defendant, George Wolfe, did execute, ratify, deliver and acknowledge, the note or writing obligatory, sued on, in presence of Gideon Wolfe and others, the witnesses to the same, to be his act and deed," and concluded to the country. Issue having been joined, the case was submitted to a jury, at April Term, 1868, who found a verdict in favor of George Wolfe, and at the same time judgment was rendered by default, against Turnmire, as administrator, for the amount of the note and costs. A new trial, after the first verdict, was granted as to Geo. Wolfe, and verdict and judgment was rendered against him for the sum of one hundred and forty-six dollars and costs, at September Term, 1868; and a new trial having been refused, he filed reasons in arrest of judgment, which being overruled, he presented a bill of exceptions; and the same having been made part of the record, he prayed an appeal in the nature of a writ of error to this Court, which was granted. No exception appears to have been taken to the charge of the Court, nor does it appear that any instructions were given to the jury; but,

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in the absence of any exception, it is to be presumed that the case was submitted upon proper instructions.

The reasons in arrest are: 1. That James Drennen is not made plaintiff, either nominal or otherwise. 2. That the note was not assigned to plaintiff or payable to bearer. 3. That, being payable in current bank notes, it is not a negotiable instrument. These reasons are relied upon here, and it is furthermore insisted that there is no evidence to sustain the verdict.

The rule stated in 1 Chitty Pl., 2, that, "in general, the action on a contract, whether express or implied, or whether by parol, under seal, or of record, must be brought in the name of the party in whom the legal interest in such contract was vested," never was, in its full extent, the law of this State. It was changed by the North Carolina statute of 1762, c. 9 C. & N., 550, so as to authorize the assignee of a note for money to sue in his own name; and this remedy was extended to bonds by the Acts of 1786, c. 4; 1783, c. 57, C. & N., 99, 500. By the Act of 1801, c. 6, it was declared that suits may be brought, both in courts of law and equity, in the names of assignees of bonds with collateral conditions, bills or notes for specific articles, or the performance of any duty. C. & N., 130. And by the Act of 1825, c. 29, sec. 3, as well as the uniform decisions of this Court, the practice in this State, of bringing suits in the name of one person for the use of another, on instruments not negotiable, as well as negotiable instruments, was recognized and well established. See 1 Yerg., 430; 4 Yerg., 261; 10 Yerg., 236; 2 Hum., 352. These provisions were substantially carried into the

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Code, §§ 1956, 2795. Although it was the practice where the original payee or obligee was dead at the commencement of the suit, to bring the action in the name of his personal representative for the use of the holder or equitable owner, yet if the suit was brought in the name of the original payee or obligee, and he died pending the suit, it was declared by the Act of 1826, c. 29, C. & N., 66, that it should not be necessary to revive the suit in his name; and this is still the law. Code, § 2858. It is expressly declared in the Code, § 2795, that "the person for whose use the suit is brought, shall be held the real plaintiff of record." It follows, therefore, that if the instrument sued on in this case was not negotiable, the objection that the suit was not brought in the name of the original payee for the use of the plaintiff, or that the note was not negotiable, is more a matter of form than of substance.

The plea of *non est factum* only in this case put in issue the execution of the note. The declaration avers that the plaintiff is the lawful bearer thereof, and his right to sue could have been tested by the demurrer or plea. The failure to do so was equivalent, especially after verdict, to an admission of the plaintiff's right to maintain the action. By the Code, § 1967, as well as under the law and practice long before subsisting, the instrument, although not negotiable, was assignable. The principle in *Kirkpatrick v. McCullough*, 3 Hum., 171, and numerous other cases, that a note payable in current bank notes is not a note for money, and, therefore, not negotiable, rests upon a highly technical distinction, as is manifested by the subsequent

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cases of *Crutchfield v. Robins*, *Tingley & Co.*, 5 Hum., 15; *Graham v. The State*, 5 Hum., 40; *Hopson v. Fountain*, 5 Hum., 140; *Baker v. Jordan*, 5 Hum., 485; *Whiteman v. Childress*, 6 Hum., 305-6; and *Draper v. The State*, 1 Head., 263, 264.

The error was cured by the verdict according to *Shelby v. Hearne*, 6 Yer., 512. It did not affect the merits, and under the Code, §§ 4516, 2874, 2865, this court has no power to reverse the judgment for the errors assigned. See *Cornelius v. Merritt*, 2 Head., 97; *Bently v. Hurxthal*, 3 Head., 378.

Although the evidence in the record does not clearly show that the note was executed, or its execution ratified, by the plaintiff in error, we cannot say there is no evidence to sustain the verdict; and as the charge of the Circuit Court is not set out or excepted to, it is to be presumed that the case was fairly submitted to the jury, whose peculiar province it was to determine the question of fact.

Affirm the judgment.

Ephraim Link v. Isaac A. Allen.

EPHRAIM LINK v. ISAAC A. ALLEN.

PRACTICE. *Suit against Partners. Dismissal.* A joint suit against two, as partners, may be dismissed as to one, and prosecuted as to the other.

FROM GREENE.

In the Circuit Court, R. R. BUTLER, J., presiding.

Assumpsit against two partners, one of whom was served with process, the other not. The suit was dismissed as to the defendant, who could not be found, and the declaration filed against the other. The defendant pleaded the non-joinder, in abatement to which was a demurrer, which was overruled, and judgment for defendant, from which plaintiff appealed.

F. A. REEVES, for plaintiff.

J. C. BEEKS, for defendant.

NICHOLSON, C. J., delivered the opinion of the Court.

The only question raised by the pleadings, is, whether a plaintiff can dismiss as to one of two partners, jointly sued, and proceed to judgment against the other.

The Court below held that he could not; this was error. Code, §§ 2787, 2790; 4 Hum., 188.

The judgment is reversed, and the cause remanded for trial.

James Gillam v. James G. Looney.

JAMES GILLAM, in error, v. JAMES G. LOONEY.

1. CERTIORARI. *Excuse for delay.* A statement in a petition for *certiorari*, that the execution gave to the defendant "the first reliable knowledge" of the judgment, is equivocal, and is not sufficient to excuse delay in applying for a *certiorari*.
2. ILLEGAL CONTRACT. *Knowledge not participation.* It seems that a statement that a note was given for a horse, which the seller knew was to be used in "the rebel service," without more, does not show a meritorious defense.

FROM HAWKINS.

In the Circuit Court, JAS. P. SWANN, J., presiding, dismissed the petition for *certiorari*, and defendant appealed.

J. T. SHIELDS, for plaintiff in error.

NICHOLSON, C. J., delivered the opinion of the Court.

On the 24th of June, 1868, Gillam obtained writs of *certiorari* and *supersedeas*, for the purpose of superseding a judgment, rendered by a Justice of the Peace, on the 24th of February, 1866. On motion, the petition for *certiorari* was dismissed, from which judgment Gillam appealed in error to this Court.

The petitioner obtained the fiat for writs of *certiorari* and *supersedeas* upon two grounds; 1st, That he was sum-

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moned for trial before one Justice on the 24th day of February, 1866, and that when the day of trial came, he learned that the warrant was not returned before the Justice before whom he was summoned. There the matter rested until June, 1866, when he found that the warrant had been returned before another Justice, and judgment rendered on the 24th of February, 1866.

The issuance of the execution on this judgment in June, 1868, "was the first reliable knowledge" he had of the judgment. His application for *certiorari* was made immediately after obtaining this reliable knowledge.†

The other ground relied on in the petition is, that petitioner was security to a note given by his principal to Locney, for a horse to be used in the rebel service, and that Looney knew the purpose for which the horse was purchased. This is all alleged by way of showing that he had merits in his application.

The *certiorari* was properly dismissed. The language of the petitioner is equivocal as to the time when he obtained knowledge of the existence of the judgment.

† See *Smith v. Brown*, Nashv., 4th January, 1871, in which this case is cited. In that case, the petition for *certiorari* stated, that petitioner "has no recollection of ever having been notified of the trial or judgment, although the warrant appears to have been returned executed;" that he "was taken completely by surprise, when the execution issued;" and that "he would have seen to his interest long since, but for his want of knowledge of the existence of said liability," and praying relief, "as he never was cited to trial, as he now best recollects," the application being made more than five years after judgment; and it being admitted in the Court below that the return of service was made, and was true; this was held to be no sufficient cause for not appealing. See also *McDowell v. Kellar*, post —.

Lewis A. Garrett v. Wm. P. Rogers.

Two years had elapsed, and the plaintiff fails to allege directly and positively, that he failed to apply for *certiorari*, for want of notice of the judgment.

Nor are we satisfied that he states a meritorious defense.†

The judgment is affirmed.

LEWIS A. GARRETT v. WM. P. ROGERS.

BILL OF EXCEPTIONS. *Not signed.* A bill of exceptions which is not signed, cannot be treated as part of the record, though the record recite that it was signed and sealed, &c. *McGavock v. Puryear.* 6 Cold., 34.‡

FROM GRAINGER.

In the Circuit Court. The name of the presiding Judge does not appear in transcript.

J. T. SHIELDS, for plaintiff in error, insisted that the recital in the record showed that the omission of the signature was a clerical mistake, and cited 1 Cow., 65; 3 Dal., 419. n.

THORNBURG and MCFARLAND for defendants.

†See *Naff v. Crawford*, ante 119; *Tedder v. Odum*, Nashv., 1870.

‡See *Nave v. Nave*, post 324; *Mynatt v. Hubbs* post 323; *Massengale v. Shadden*, post 357.

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TURNEY, J., delivered the opinion of the Court.

The objection made to the record that the bill of exceptions is not signed by the Circuit Judge, is fatal. To hold otherwise, would be to open wide a door to confusion and fraud, and to invite unscrupulous parties to flood the dockets of this Court with unidentified and unauthenticated files purporting to be records. The truth of the case being fairly stated in the bill of exceptions, the Judge shall sign the same, which thereupon becomes a part of the record in the cause. Code, 2968.

“A bill of exceptions to become a part of the record, must be made up and signed by the Judge at the term in which the trial is had.” *McGavock v. Puryear*, 6 Cold., 34.

This rule is sound in principle, and although it may operate hardly, and with seeming harshness in this case, in which the bill of exceptions is not signed at all, and in which the failure to have it signed is the result of oversight, yet we cannot infringe a rule so important and necessary in practice, and so vital to the interests of litigants.

The appeal is dismissed.

Sawyers Mynatt *et als.* v. James Hubbs.

SAWYERS MYNATT, THOMAS HOWELL and HUGH LUTTRELL, plaintiffs in error, v. JAMES HUBBS.

BILL OF EXCEPTIONS. *Exhibit lost Remand to supply.* Where a paper, the loss of which can be supplied in the inferior Court, under the Code, —, is shown by the bill of exceptions to be lost, the cause may be remanded to supply the loss.

Motion to dismiss appeal, because it is certified in the transcript that the deposition of a witness read and made part of the bill of exceptions, can not be found.

W. P. WASHBURN, for the motion, insisted that this course had been taken at the last term, in the case of *Boshears v. Lay*, MS.

T. E. CHAMPION, for plaintiff in error, said he had examined the record in *Boshears v. Lay*; that no written opinion could be found, and no judgment of dismissal had been entered. A motion was made, Rec., p. 494, to dismiss the appeal. A motion for *als. plu. certiorari*, on p. 513, and time extended to return *certiorari*, on p. 627. He insisted that under the Code, 3170, 3907, 3908; and *Seay v. Hughes*, 5 Sneed, 155, that the cause might be remanded to supply a defect in the record. Also cited Code, 2864 and 3171.

He insisted that where a record is so imperfect that the Court can not say that the facts warranted the judgment, the cause will be remanded and a *venire de novo* awarded; citing *Bennet v. Schermer*, Breese, (Ill.) 352.

By the Court, NICHOLSON, C. J.

The cause will be remanded, that the lost depositions may be supplied under the statute.

Isacc L. Nave v. J. J. C. Nave.

ISAAC L. NAVE v. J. J. C. NAVE.

1. BILL OF EXCEPTIONS. *No charge. Judgment affirmed.* Where the bill of exceptions is defective in a material particular, by reason of which no error appears in the record, the judgment below must be affirmed; as where there is no charge, and a proper charge would sustain the judgment below.
2. CERTIORARI. *When not awarded.* No certiorari will be awarded where it appears that it will not avail anything, as where the Clerk certifies that he has made diligent search for a portion of the record, and it can not be found.*

FROM CARTER.

From the Circuit Court of Carter county.

NELSON and DEADERICK, J's, having been of counsel, did not sit in this case.

R. M. BARTON, for defendant in error.

SHIELDS, S. J., delivered the opinion of the Court.

This is an action for slander, instituted in the Circuit Court of Carter county, by the defendant in error, against the plaintiff in error, on January 10th, 1860. The cause was tried at the November Term, 1860, and the jury found in favor of the defendant in error, and assessed his damages at two hundred and fifty dollars. A rule to show cause why the verdict should be set aside, and a new trial granted, was entered, which was

*NOTE.—See *Mynatt v. Hubbs*, ante. 323.

Isaac L. Nave v. J. J. C. Nave.

discharged, and judgment rendered on the verdict. The plaintiff in error tendered a bill of exceptions, which was signed and sealed by the Court, and ordered to be made a part of the record, and prayed and obtained an appeal, in the nature of a writ of error, to this Court. On the 24th of August, 1861, he filed what purports to be a transcript of the record, but on examination of the same, we find in the bill of exceptions the following:

“The Court charged the jury as follows.”

The Clerk then states, that “no charge by the Court being on file with the papers, the Clerk is, therefore, unable to copy it here.”

The certificate of the Clerk is in these words: “I do hereby certify that the foregoing is a true and perfect copy of the record, as the same appears in my office, and as it came to my hands from my predecessor in office, under whose administration the trial was had and appeal taken; and that I have copied all the papers in the original record now on file; and that I have made diligent search for the missing papers, and can not find them in my office.”

It thus appears, on the face of the bill of exceptions, that the charge of the Court was made a part of the same; and from the statement and certificate of the Clerk, that it is lost, and, therefore, is not copied into the bill of exceptions.

The plaintiff in error has, therefore, failed to file in this court, a perfect transcript of the record. It is defective in a most important particular. Further, it clearly appears that the defect cannot be remedied by a suggestion of diminution and a *certiorari* for a more

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perfect transcript, because the proper officer has already made a diligent search for the charge of the Court, and it is not to be found.

Upon this state of facts, we hold that the cause is not before us in a condition to be reviewed, and that the judgment must be affirmed. It is incumbent on the party who prays an appeal, in the nature of a writ of error, and seeks a reversal of the judgment, to show that there is error in the record, which, in the case before us, he could only do by filing a full and perfect transcript of the record in the court below.

We are bound to presume, until the contrary be made to appear, that the judgment of the court below is correct; and the party asking a reversal must show that the judgment is wrong; *Cornelius v. Merritt*, 2 Head, 97, 99; *McBee v. Petty*, 3 Cold., 178. This can only be done, if there be error, by filing a full and perfect transcript of the record. If by reason of accident this cannot be done, it is the misfortune of the appellant, and he must bear the consequent loss. The appellee has established his right to recover, in the court below; the judgment which he obtained is *prima facie* correct, and he cannot be deprived of the benefit of it, by an accident, for which he is not to blame.

If there was error on the face of the record, of a character that could not possibly have been cured by the charge of the Court, a different question would arise; but we cannot see any, of that description, and we are bound to presume that the instructions of the court, to the jury, were in all things correct.

We are not called upon to decide whether the acci-

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dent, by which the plaintiff in error, has failed to have the proceedings, in the court below, reviewed in this court, is one against which he may have relief, in some further proceeding; and we leave this question undecided, but affirm the judgment of the court below, without prejudice to such right, if any, he have.

Affirm the judgment.

S. COCHREHAM and WIFE v. D. KIRKPATRICK *et als.*

1. DEVISE. *Against policy void.* A will which took effect in 1859, devising land to a negro, (who was, by the will, to be free at the death of the testator's wife,) to reside upon, was held to be against the policy of the law as it then stood, and void.
2. WILL. *Tested by the law, at the death of testator.* The will takes effect from the testator's death, and the law then in force determines its validity, even though the enjoyment of the devise may be postponed until a different state of the law prevails.

FROM HAWKINS.

In the Chancery Court at Rogersville. The bill is addressed to S. J. W. LUCKY, Ch.; but who presided when the demurrer was allowed, does not appear by the transcript.

A. H. PETTIBONE, for complainants.

J. T. SHIELDS, for defendants.

NELSON, J., delivered the opinion of the Court.

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From the allegations in the bill, it appears that William Smith made his last will and testament on the 18th day of July, 1859, to which he executed a codicil on the 3d of September, 1859, and that he departed this life on the — day of —, 1859. The complainant, Eliza, was the slave of the testator at the date of the will and codicil, and at the time of his death.

In the original will, the testator devised a part of his land to his daughter, Elizabeth Kennan, and then provided as follows: "All the balance of my land, where I now live, adjoining the lands of David Reynolds, John Reynolds and others, I give and bequeath to my son, Sevier Smith, on the following conditions: That the said Sevier Smith is hereby bound to support me and his mother, Winney Smith, and clear of want during our natural lives or during my wife's widowhood." In the eighth clause of the original will, it is provided: "It is also my will and desire that my black girl, Eliza, be free at my death, and that she is not to be subject to be sold by any of my heirs, and that none of my children nor wife is to have any claim on her as being a slave; and she is to have the privilege of living on the land that I have given to my son, Sevier, or living with any of the connection, as the case may be."

The codicil, among other provisions, contains the following: "It is also my will that my black girl, Eliza, be not free until the death of my wife." It is charged in the bill that, "since the death of said William, and since complainants were freed by the act of the government, they have continued to live on said land, and

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with the said Winney Smith, as was desired by the said William, deceased."

It is further charged that Sevier Smith died intestate, after the death of the testator; that his interest in the land was sold to pay his debts, and bought by one David Kirkpatrick, who has brought an action of unlawful detainer against the complainants; and the objects of the bill are to enjoin said suit, to have the will so construed as to secure complainants a home on the land, and for general relief.

A special demurrer was filed and allowed, and the bill dismissed without prejudice, and an appeal prayed to this Court, which the complainants were allowed to prosecute "*in forma pauperi*," as the record states.

We are of opinion that there is no error in the decree of the Chancellor dismissing the bill, and that it was properly dismissed on both the grounds assumed in the demurrer.

1. As it was declared by this Court in *Chapman v. The State*, 2 Head., 40, that the Code of Tennessee went into operation on the 1st day of May, 1858, a short time before the date of the testator's will, it is not necessary to recur to any of the provisions of the former statute. Under the provisions of the Code, sections 2692 to 2710, the assent of the State to the emancipation of slaves could "be given only on condition of immediate removal from the State," and provisions were made for their transportation to the Western coast of Africa. None were allowed to remain, "unless, from age or disease, they were unable to go." It does not appear that the complainant, Eliza, ever obtained, or at-

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tempted to obtain, the assent of the State to her emancipation. It was manifestly the intention of the testator that she should remain in the State, and the bequest of freedom, on this condition, was unlawful and void, not only under the Code, but under previous laws of a similar character, as construed in *Bridgewater v. Pride*, 1 Sneed, 195, and *Boon v. Lancaster*, 1 Sneed, 584, 585.

2. If any doubt can exist as to the true construction of the original will, there can be no doubt that, under the codicil, the right of complainant, Eliza, to emancipation, was only to take effect upon the death of the testator's wife, and as it appears from the bill that she is still living, this would be only an inchoate and imperfect right, that could not be enforced until after the demise of Mrs. Smith.

The privilege of living upon the land was void, as being contrary to the policy of the State at the date of the will, and the time of the death of the testator, and could not have been enforced if Mrs. Smith had died before the late civil war. The rights of the complainant, Eliza, so far as the questions raised in the bill are involved, depend upon the will and codicil, and not upon her subsequent freedom, under Article 13 of the Constitution of the United States, and later provisions in the Constitution of Tennessee, neither of which could so operate as to vest an interest in the land, or its use and enjoyment, contrary to the will of the testator, and the laws and policy of the State, existing at the time when it took effect.

Let the decree of the Chancellor be affirmed.

Garret Lane v. Sarah Courtney et al.

GARRET LANE v. SARAH COURTNEY et al.

DOWER. *Lands held by parol purchase.* A widow is not entitled to dower of lands held by her deceased husband under a parol purchase. He is not the "equitable owner." Code, § 2398.

COSTS. Bill filed to enforce vendor's lien. Widow by answer attempts to set up right of dower and fails. Cost of answer and of appeal adjudged against her.

FROM GREENE.

In the Chancery Court at Greeneville, S. J. W. LUCKY, Ch., presiding.

R. MCFARLAND & MCKEE, for complainants.

R. M. BARTON & W. MCFARLAND, for defendants.

NICHOLSON, C. J., delivered the opinion of the Court.

This cause is brought to this Court, by writ of error, from the Chancery Court at Greeneville. The writ of error is prosecuted by only one of the defendants, Caroline Courtney. The error assigned is, that the Chancellor decreed against her claim for dower. The land in which she claims dower was purchased by her husband from complainant, but the contract of sale was by parol, and, therefore void by the statute of frauds. But inasmuch as complainant files his bill to enforce his lien for unpaid purchase money, and as the contract of purchase was in part executed, and as the purchaser died in possession of the lands, having paid a small

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portion of the purchase money, and made lasting and valuable improvements on it, she insists in her answer, that she has a right to be endowed, either in the whole tract, or in the surplus after the purchase money is satisfied. But she files no cross bill for the enforcement of this right. If the case was so presented as to authorize the court to grant the relief prayed for in her answer, we are of the opinion that her husband did not die so seized and possessed of the land as to entitle her to dower. He was possessed of the land under a void parol contract, and, therefore, had no title, either legal or equitable, under which a claim to dower could arise. It is true by the Code, widows may be endowed of lands of which their husbands were equitable owners, § 2398; but the husband of complainant was no such equitable owner: First—because his contract of purchase being void by the statute of frauds, he acquired no title whatever; and second—because not having paid for the land he was not the equitable owner. 1 Cold., 554, 2 Head, 80.

The Chancellor so held, and we affirm the decree, but direct that the defendant pay only the costs of her answer in the court below, and the costs of this court, the complainant to pay the other costs.

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SARAH M. VINCENT *et als* v. GEO. W. VINCENT,
Administrator, *et als*.

1. EQUITY JURISDICTION. *Year's support for widow. Objection to.* If a bill in equity be filed to secure a widow the articles exempt from execution and to lay off her year's allowance, the objection to the jurisdiction is waived, unless taken *in limine*.
2. SAME. *Same. Dower.* So of a bill filed to bring into Chancery a litigation pending in a Court of concurrent jurisdiction, as where a petition for dower is filed in the County Court, and order to lay off dower and report of Commissioners made.
3. DOWER. *Value of mansion-house not computed.* In the assignment of dower, the widow is entitled to one third in value of the lands of her husband, and the mansion, *etc.*, to be included in the part allotted, but the value of the improvements is not to be regarded in estimating the quantity to be assigned her, unless the improvements can not be assigned her without manifest injustice to the children.
4. SAME. *Assignment of timber.* A widow is entitled to a valuable and convenient part of the timber as a part of her dower.
5. YEAR'S SUPPORT. *Step-children.* Step-children, living with a widow at the time the year's support is assigned, afterward taken away without the widow's consent, are not entitled to any part of the year's allowance.
6. SAME. *Fixed by state of things at death of husband.* Year's support should be fixed as to amount, by the condition of things at the death of the husband, not by changes which take place within the year.
7. PROPERTY EXEMPT. *Widow takes.* Articles exempt from execution by laws passed since the Code, go to the widow under the provisions of § 2288.
8. STATUTE. *Construction.* Statute in present tense may be applied to Acts subsequently passed.

FROM SULLIVAN.

In the Chancery Court, at Blountville, S. J. W.
LUCKY, Ch., presiding.

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J. G. DEADERICK, for complainants, cited *Sanderlin* v. *Sanderlin*, 1 Swan, 441; 4 Kent, 76.

R. MCFARLAND, for defendant, cited *Bayless* v. *Bayless*, 4 Cold., 359.

NELSON, J., delivered the opinion of the Court.

Thomas M. Vincent departed this life intestate, on or about the 21st of May, 1866, leaving the complainant, Sarah M., his widow, and five children, his heirs at law. Two of the children were born during a former marriage, and the names of the other three are joined with that of their mother, who now acts as their next friend, as complainants. Geo. W. Vincent was appointed administrator of the estate, at the July Term, 1866, of the County Court of Sullivan County. It is alleged in the pleadings, that, at the same term of the County Court, on application of the widow, commissioners were appointed to allot to her a year's support for herself and family, and also to lay off the widow's dower. Reports were signed by the different commissioners, bearing date 25th July, 1866, and it is alleged in the answer of the administrator, that said reports were returned to, and confirmed by, the County Court, but there is no evidence in the record, as to the correctness of this allegation. The widow being dissatisfied with the proceedings in the County Court, filed this bill on the 10th of October, 1866, for the purpose of obtaining an assignment of dower, and allowance for her year's support, and a decree against the administrator, for the value of certain articles exempt by law from execution, which were sold by him. It is now

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objected that the County Court acquired exclusive jurisdiction over the various subjects mentioned in the bill, and that the Chancery Court has no jurisdiction of the questions, as to the articles exempt from execution, and the widow's allowance; and is precluded from exercising its concurrent jurisdiction, as to the assignment of the dower, by reason of the application to the County Court. It is a sufficient answer to this objection, that the jurisdiction of the Chancery Court was not resisted by plea in abatement, demurrer, or motion to dismiss, as expressly required in the Code, 4309, 4318, 4321, 4385. Under section 4321 the filing of an answer is a waiver of objections to the jurisdiction of the Court, and the cause can not be dismissed, but must be heard and determined upon its merits.

Under the direction of the Chancellor, two reports were made by the Master, to which exceptions were filed, but it is only necessary to notice so much of the proceedings in the Court below as we think is erroneous.

The intestate died seized and possessed of a tract of land containing three hundred and seventy acres, of which eighty-six and a half acres, by metes and bounds, were set apart, in the report of the Commissioners, as dower; and this report addressed to the County Court, was made the basis of the Master's report, and the Chancellor's decree. It is stated in the Master's report that the evidence of four of the witnesses tends to show that the dower, as laid off by the Commissioners, is less in value than one-third part of the tract of land, exclusive of the improvements, while the evidence of six other witnesses tends to establish the contrary. A careful examination

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of the record has satisfied us that the evidence of the four witnesses does not merely *tend to show* that the assignment of dower was made upon an erroneous principle, but conclusively demonstrates the fact. They state as positively as witnesses could with propriety make such a statement, that the eighty-two and a half acres exclusive of the improvements, are not equal in value to one-third of the tract of land; and nearly all the witnesses agree in the statement, that while the entire tract contains more than enough woodland to support it, the quantity of timber land included in the eighty-six and a half acres is not more than sufficient to re-build the fences; that it is inconveniently located on a cliff, difficult of access; that there is timber in sufficient quantity growing nearer the mansion house, which would be more convenient to the widow, and the assignment of which would not be seriously detrimental to the estate in remainder. One of the three Commissioners who was examined as a witness for defendants, states that they supposed that the widow would be appointed guardian for her three children, and thought she could get enough timber off that part allotted to the children to supply the south end of the dowry. Another of the Commissioners states in substance, that he thinks the attempted assignment of dower was substantially correct. But, from his official character, we attach the most importance to the statement of the County Surveyor, who was one of the Commissioners, and was also examined as a witness, touching the reasons by which he was influenced in making his report, and which we think it probable, from all the circumstances, exerted, also, a control-

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ling influence over the action of the other two Commissioners. In his deposition, he states that, "as one of the Commissioners, I placed an estimate of six or eight hundred dollars upon the mansion house, and then valued the land, and deducted the value of the house from the land." This statement of the witness, and other evidence in the record, and the action of the Chancellor, raises the question as to what construction shall be placed upon the provisions of the Code which relate to the mansion house, and other buildings and improvements.

It is provided in the Code, 2398, that if any person die intestate, leaving a widow, she shall be entitled to dower in one-third part of all the lands of which her husband died seized and possessed, or of which he was equitable owner. By sections 2401 and 2402, it is declared that, in said third part shall be comprehended the dwelling house in which the husband was accustomed most generally to dwell next before his death, commonly called the mansion house, unless the widow agree that it shall not be included, together with the offices, out-houses, buildings and other improvements thereunto belonging or appertaining; but if it appear to the Court assigning the dower, that the whole of said dwelling house, out-houses, offices and appurtenances, cannot be applied to her use, without manifest injustice to the children, or other relations, then such part or portion thereof as the Court shall conceive will be sufficient to afford her a decent residence, due regard being had to her condition and past manner of life, shall be assigned to her. Section 2403 provides that where there are more tracts than one, the Commissioners shall not be compelled to assign her a third part of each separate tract, but may make

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the assignment, according to quality and quantity, in such manner as will give her one-third in value of the whole estate.

The section last cited contains no special provision as to the mansion house and other improvements, but relates only to the mode of assignment where there are more tracts than one. The two previous sections have especial reference to the mansion house and other improvements; and if those sections are susceptible of two interpretations, we hold that, according to the uniform course of decisions in England, and in this State, it is our duty to select the one which is most favorable to the widow. In Parks' Treatise on the law of dower, it is said "that from the earliest periods of the existence of the common law in England, a very extraordinary degree of favor was bestowed in the administration of justice on this provision for the support of a wife surviving her husband. The vigilance of the Courts in watching over her interests, is very amply displayed in the Year Books and other early reports. Dower was, indeed, proverbially the foster child of the law; and so highly was it valued in the catalogue of social rights, as to be placed in the same scale of importance with liberty and life. 9 Law Lib., 2 m. Although the right is not so extensive in this State as in England, the Courts have always given a broad and liberal construction to the law giving dower, as was declared in *Harrell v. Harrell*, 4 Cold., 379, 380, and *Tarpley v. Gannaway*, 2 Cold., 248.

The primary intention of the Legislature, in section 2398 of the Code, was to give to the widow one-third part of all the lands; and in section 2401, that this part

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should include the mansion-house and other buildings and improvements specified, without any reference whatever to the value of the buildings and other improvements. But, as in cities and towns, the buildings and other improvements often constitute the bulk of the estate, and by assigning the whole to the widow, as dower, injustice might be done to the children or other relatives, section 2402 provides against such manifest injustice by declaring that such part or portion only shall be assigned as will be sufficient to afford her a decent residence. This might well be done in a large town or city, where buildings are frequently so constructed as that different families may reside under the same roof without inconvenience. But, as we apprehend, the instances are rare in this State, where houses are erected upon farms, or in the country, with reference to their occupation by more than one family, we hold that, as a general rule, the value of such improvements is not to be taken into the estimate in assigning the widow's dower. The statute does not contemplate a valuation of the improvements, and that such of them as are allotted to the widow shall be set off against an equal value in land. The direction is explicit, that such part or portion only of the dwelling-house, out-houses, &c., as can be applied to her use, without manifest injustice to the children, shall be allotted to her. The leading object of the statute is to give her the mansion-house and buildings, or such part thereof as will afford her a decent residence, due regard being had to her condition and past manner of life. It was not the intention to compel the widow to take all the buildings and improvements, and to lose any part of

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that share of the land which was intended to be assigned for her support. Her past manner of life is to be determined by the manner in which the intestate was living at or about the time of his death; and if he was then occupying a comfortable residence, it is to be presumed, as a general rule, that the intention of the Legislature was, that she should continue to reside there, without paying rent to the heirs, in the form of an equivalent in land. There may be exceptional cases, but there is no evidence in the record to show that this case should constitute an exception to the general rule. The value of the entire tract of land is not shown in the testimony, but there is evidence that the improvements were worth about twenty-five hundred dollars.

It is in proof that the testator was "one of the best livers in the country," and that his estate is not embarrassed with debt. He was the father of the three children by the complainant; and there is no evidence to show that she refused to allow the two children by a former wife to reside with her. We do not hold that she was under any legal obligation to permit them to remain; but, upon the facts of this case, we declare that the assignment to the widow of less than one-fourth of the tract of land does not meet the requirements of the statute, and that this case shall be remanded to the Chancery Court to the end that Commissioners shall be again appointed and dower allotted to the widow, so as to include the mansion-house, out-houses, buildings and other improvements, without charging her with their value or any part thereof, and so as to include within the dower assigned a ratable and convenient part of the

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timber land sufficient to support the tract which may be assigned as a dower.

Exception was taken to the Master's report, allowing only six hundred dollars for the year's support of the widow and her family, but the exception was overruled by the Chancellor; and it was directed in his decree, that four hundred dollars of this amount should be paid over to the complainant, who is guardian to Mary, Charles and William Vincent, and two hundred dollars to John Hunt, who is guardian of Kate and Laura Vincent. It does not appear from the record, that Kate and Laura were living with John Hunt at the time of their father's death. One of the defendant's witnesses, who was one of the Commissioners appointed to ascertain the year's allowance, and set apart the property exempt from execution, states that there was a question at the time, whether the children would stay with the widow or not. The widow said she wanted them to stay with her, and there was an agreement that if the children, two little girls, by his first wife, left, they should have one of the cows, and it was to go with them for their benefit. From this evidence it may be fairly inferred, that the children were living with the complainant at the time of the death of their father, and that they were taken away against his widow's consent and under these circumstances, we hold that the Chancellor erred in directing that any part of the allowance should be paid to the guardian. Under the Code, 2287, the moneys and effects set apart for the support of the widow and her family, until the expiration of one year after the decease of the husband, are declared to be the abso-

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lute property of the widow, for said uses, and shall not be taken into the accounts of the administration of the estate of said intestate, nor seized upon any precept or execution; the right or title to the money and effects passes at once to the widow, according to *Bayless v. Bayless*, 4 Cold., 363. At the death of her husband, the two children were part of complainant's family. and as the title to the money and effects was vested in her, it was error to direct that any part of it should be diverted into the hands of the guardian. The policy of the statute is to keep the family together, at least for a year after the death of the intestate, and to make the widow the head of the family. To allow any part of the fund to be taken from her, and placed in other hands, has a tendency to interrupt the harmonious relations that should exist between members of the same household, and to subvert the lawful authority of the widow, either as a parent, or standing *in loco parentis*. The effect of such an order is to annul the express provision of the statute, and to declare that the moneys and effects are not the absolute property of the widow.

Of the witnesses examined as to what should be the amount of the pecuniary allowances to the widow for the year's support of herself and family, one fixes the amount at \$800, another at \$700 or \$800, another at \$750, another at \$600, another at \$442.58, and another at \$400; and in view of the facts of this case, we are of opinion that complainant's exception to the Master's report should have been sustained, and the allowance fixed at seven hundred dollars for the widow and children. We hold that the amount of the allowance should be regulated by

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the state of facts existing at the time of the intestate's death, and not by any changes in the family within a year afterward.

The Chancellor's decree is also erroneous in not charging the administrator with those articles exempt from execution, which were taken from the widow's possession, and sold by him. It seems that the widow was properly allowed to retain all the articles on hand at the time of intestate's death, which were exempt from execution under the specific provisions of the Code; but the decree of the Chancellor declares that the articles exempt from execution by the Acts of 1859-60 do not vest in the widow under that Act, and that they were properly sold. There are two exemption laws contained in the Acts of 1859-60. By chapter 31, it is declared that there shall be exempt to each head of a family twenty bushels of wheat, under the same rules and regulations as provided for in section 2107, of the Code of Tennessee, and by chapter 66, sections 2 and 3, a sewing machine, an additional cow and calf, fifty pounds of picked cotton, twenty-five pounds of wool, a sufficient quantity of upper and sole leather to provide winter shoes for the family, and an additional horse or mule, are exempt from execution. We hold that the Code, 2288, which provides that the property exempt by law from execution shall, on the death of the husband, be exempt from execution in the hands of, and be vested in, the widow, without regard to the size or solvency of the estate of the deceased, &c., is not limited to the articles specifically enumerated in the Code, 2107 to 2113, inclusive; that the statute is not temporary, but

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perpetual, in its nature, and that the language is such as to embrace all property which has been exempted from execution at any time subsequent to its passage. The administrator will, therefore, be required to account for all articles disposed of by him, which were exempt from execution at the time of the intestate's death.

The Chancellor's decree will be affirmed, so far as it accords with this opinion, and reversed in other respects, and the case will be remanded. The costs in the court below, and in this court, will be divided into three equal parts—one of which shall be paid by complainants, another by the administrator, and the third by the guardian.

LUCINDA REYNOLDS v. JAMES H. VANCE, *et al.*

1. DOWER. *Deed in fraud of. Test of fraud.* A gift whereby a husband actually and openly divests himself of his property and of the enjoyment of it in his lifetime in favor of children and others, making, according to the circumstances of his family, a just and reasonable present provision for persons having meritorious claims, and not with a view to defeat or diminish his wife's dower, is not void as in fraud of a dower.
2. SAME. *Same.* Where a deed was made by a husband to his three children, conveying to them all the real estate of the grantor in *presenti* for a recited consideration of \$3,000, a real one of \$300 and of love and affection—was acknowledged for registration on the day it was made, but not put of record for eight years, nor until the grantor died, he remaining in possession until his death, the only reason given for the delay being that it was neglected, it was held void as against the wife.

FROM HAWKINS.

Appeal from the Chancery Court, SETH. J. W. LUCKY, Ch., presiding.

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C. W. HALL, for complainant.

J. T. SHIELDS, for defendants.

NICHOLSON, C. J., delivered the opinion of the Court.

Complainant files her bill in this cause, to be endowed of the land of her late husband, John Reynolds, and for her distributive share in his personal estate. Their marriage took place in 1848, he having three children by a former marriage, and she also having several children by a former marriage. He died in 1865, over seventy years of age; complainant being at that time, between fifty and sixty years of age. In 1857, her husband, John Reynolds, made a conveyance in fee simple, of all the land he owned, to the defendants, his three children. Complainant alleges that this conveyance was made to defraud her of dower, and she prays that the conveyance may be set aside and dower assigned to her.

Complainant claims dower under the provisions of section 2406 of the Code, which enacts that "any conveyance, made fraudulently to children, or otherwise, with an intent to defeat the widow of her dower, shall be void." This statute is a transcript of the act of 1784, which was construed in the case of *Littleton v. Littleton*, 1 Dev. & Bat., 330; and the construction placed upon it in that case, was followed and adopted by the Court in the case of *McIntosh and Wife v. Ladd*, 1 Hum., 459. In the North Carolina case, the Court say *bona fide* conveyances, that is to say, such as are not intended to defraud the widow, do not seem to be

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within the meaning, more than within the words, of the act; such are sales, to make which a power is allowed the husband; such, too, appear to be, *bona fide* gifts whereby the husband actually and openly divests himself of his property and the enjoyment of it, in his life-time, in favor of children and others, thereby making, according to his circumstances and the situation of his family, a just and reasonable provision for persons having meritorious claims on him, and with that view, and not with the view to defeat, nor for the sake of diminishing, the widow's dower.

It is clear that the intent to defeat the widow of her dower must have existed and operated at the time the conveyance was made, to authorize the Court to declare it void. To determine whether such intent existed and operated at the time of the conveyance or not, must depend upon an examination of the facts in proof.

As well as we can discover from the proof, complainant and her husband lived harmoniously together for a number of years after their marriage, and probably were so living when the conveyance was made, in 1857. At that time, besides the lands in controversy, John Reynolds was the owner of several slaves, and had a considerable amount of other personal property. He was then in need of money, which was furnished to him by defendants, to the amount of three hundred dollars, and thereupon, on the 31st of July, 1867, he made the conveyance, which is sought to be set aside for fraud.

By reference to the deed, it appears that it purports to be a bargain and sale of the land "for the consideration of three thousand dollars in hand paid." It is an

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absolute deed in fee simple, with covenants of general warranty. It was executed in the presence of two witnesses, who subscribed it as such. It appears further, from the certificate of James H. Vance, Clerk of the County Court, who is one of the defendants, that John Reynolds; on the 31st of July, 1857, the date of the deed, acknowledged the same for registration, but that it was not registered until 1865, after the death of John Reynolds, but it does not appear who had possession of it after its acknowledgment and until its registration. The proof further shows that the money consideration was three hundred dollars, instead of three thousand, and that love and affection, as alleged in the answer, was a material consideration of the conveyance. It appears in proof, that John Reynolds continued to occupy and use the land after the conveyance, and until his death. Complainant alleges that she knew nothing of the conveyance until after the death of her husband, and this allegation is not denied.

In answer to the allegation in the bill that the deed may have been antedated or may have been a forgery, defendants say: "If the complainant is serious in charging that the conveyance is a forgery, or was executed at a time subsequent to its date, or privately, all of which is denied, she can have the benefit of the testimony of the subscribing witnesses thereto, who are now residents of the town of Rogersville." It does not appear that the subscribing witnesses were examined by either party. Defendants deny that the deed was made for a fraudulent purpose, and say the delay in its registration was the result of mere negli-

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gence. The answer is sworn to by only two of the defendants, James H. Vance and Lucy C. Vance.

It is to be observed that it is the intent with which the husband sells or gives his land, upon which the right of his widow to dower must depend. It appears that in the case before us, the husband divested himself of all the land he then owned. It appears further, that he vested the absolute title in his three children, and by so doing, if the conveyance was valid, he defeated and annulled the dower right of his wife. Did he thus divest himself of the title of all his land with the purpose and intent of defeating her right to dower? If his intent and purpose went no further than to make a just and reasonable provision for his children, according to the circumstances and situation of his family; and if he actually and openly divested himself of his property, and the enjoyment of it, in favor of his children, then the conveyance was free from fraud, and the dower right of his wife was defeated. But such is not the case made by the facts and circumstances to which we have referred. The deed on its face, purports to be a bargain and sale for the consideration of three thousand dollars in hand, paid—in truth it was a gift, except the inconsiderable sum of three hundred dollars. The deed is absolute, and entitled the defendants to immediate possession—yet he continued in the uninterrupted possession and use of the land until his death, a period of about eight years. The deed was executed and acknowledged before one of the defendants on the 31st of July, 1857, but is withheld from registration for eight years, and until after the death of the husband. The only reason given for this delay is,

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that it was mere negligence. These facts are wholly inconsistent with the supposition that he had no intent or purpose to defeat his widow of dower, and that the conveyance was a *bona fide* gift, whereby he actually and openly divested himself of his property, and the enjoyment of it, in his life-time, in favor of his children, thereby making, according to the circumstances, and the situation of his family, a just and reasonable provision for them, and not with the view to defeat, nor for the sake of diminishing the wife's dower.

We affirm the decree of the Chancellor.

WESLEY A. PHIPPS, Plaintiff in error, v. JAMES L.
CALDWELL.

EVIDENCE. *Deposition. Caption. Several suits.* Two plaintiffs having suits against the same defendant in the same court, took, under one caption and certificate, the depositions of several witnesses, at the same time and place, a portion of the depositions to be read in one case, and a portion in the other. Held, on exception to one of said depositions, that it was error to admit it as evidence in either case.

FROM HAWKINS.

Appeal in error from the Circuit Court, E. E. GILLENWATERS, J., presiding.

The caption to the depositions excepted to shows that the depositions of six witnesses were taken on notice,

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three to be read in the case of *Caldwell v. Phipps*, and three in the case of *Farmer v. Phipps*.

The defendant appeared on the day specified in the notice; but the taking being continued the next day, he did not appear; and he was not present at the taking of the deposition of Susan Hagood, which was the one read on this trial.

The exception taken was "because the depositions in the two distinct cases and with different parties plaintiff and defendant, and different causes of action, are taken under one caption and one certificate, and without any agreement of parties that they should be read in both cases."

J. T. SHIELDS, for plaintiff in error.

R. McFARLAND, for defendant.

DEADERICK, J., delivered the opinion of the Court.

This is an action of trespass, instituted against the plaintiff in error, for the alleged illegal taking of one negro girl and two horses, the property of the defendant in error.

At February Term, 1868, verdict and judgment was rendered against defendant below, and a new trial having been refused, he appealed in error to this Court.

There were pending in the Circuit Court two suits against the plaintiff in error, at the same time, to-wit: this cause and a suit of one George Farmer. Each of the plaintiffs below gave Phipps notice that he would take depositions of certain witnesses on the same day and before the same commissioner.

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The depositions were accordingly taken at the time, and before the commissioners designated in the notice. They were all taken under the same caption, having but one certificate.

The caption recited that part of the depositions were to be read in one of said causes, and others were taken, to be read as evidence in the other of said two causes.

Thus all the depositions constituted but one file, and upon this ground they were excepted to; the exception was sustained by the clerk; but upon appeal, was disallowed by the Court, and the depositions were allowed to be read upon trial of the cause, to which defendant below objected.

Such a practice we hold, should not be tolerated. All our statutes, upon the subject, evidently contemplate that the depositions in each cause, pending in court, should be taken in and filed with the other papers in that cause.

The case of a change of venue in one of two causes pending in the same court, in which a deposition may have been taken, clearly illustrates the mischievous consequences, which must necessarily result from such a practice. We hold, therefore, it was error to allow a deposition, taken in two distinct causes, to be read in either of said causes.

The judgment of the Circuit Court will be reversed, and the cause remanded for a new trial.

Thos. S. Hawkins v. Kizziah McNamara, Admr'x, etc.

THOS. S. HAWKINS v. KIZZIAH MCNAMARA, Admr'x, etc.

EVIDENCE. *Deposition. Exception.* Depositions taken before a J. P., excepted to before the Clerk on appeal, and exceptions allowed, cannot be admitted by the court on the trial. The action of the Clerk is conclusive, unless appealed from and reversed before the trial begins. Code, 3869.

FROM SULLIVAN.

In the Circuit Court, before E. E. GILLENWATERS, J.

J. G. DEADERICK & F. W. EARNEST, for plaintiff in error.

J. T. SHIELDS, Sp. J., delivered the opinion of the Court.

This is an action upon an account, commenced before a Justice of the Peace, who gave judgment in favor of the defendant in error, from which an appeal was prosecuted to the Circuit Court of Sullivan county, where the cause was again tried, and again resulted in a judgment in favor of the defendant in error, from which the defendant below prosecutes this appeal in the nature of a writ of error.

It is insisted that the judgment should be reversed on the facts; but on a careful reading of the evidence, as it appears in the bill of exceptions, we have arrived at a different conclusion. The instructions of the Court were in all things correct, as is expressly conceded;

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there is much testimony on both sides of the question, conflicting in its character, and some of the witnesses are impeached; and as the credit due to the witnesses, and the preponderance of their evidence, which can not be properly said to be very great on either side, were questions fairly submitted to the jury, and decided by them, we can not disturb the judgment of the Court below on this ground.

An error is insisted upon, which we regret is so clear that we are under the necessity of reversing the judgment and remanding this small cause for another trial.

Certain depositions were taken by the defendant in error, which were read on the trial before the Justice of the Peace.

These depositions were filed with the other papers in the cause in the Circuit Court, whereupon the plaintiff in error excepted to them on various grounds. The exceptions were allowed by the Clerk, from whose decision no appeal was taken to the Court, nor were any steps taken to cure or correct the alleged defects. But in the progress of the trial the plaintiff below offered to read these depositions, to which the plaintiff in error objected, on the ground that the Clerk's decision remained in full force and effect, and that it was now, after the trial had commenced, too late to have it reversed. The objection was overruled, the judgment of the Clerk reversed by the Court, and the depositions allowed to be read to the jury.

This was error. It was too late to call the action of the Clerk in question, after the trial had commenced. Code, 3869. We regard the statute as clearly requir-

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ing an appeal to the Court to be taken, and a decision made before the cause is heard or tried, else it can not be done at all. There is sound reason for these statutory rules. They prevent surprise in the admission or rejection of evidence, which is a matter of the first importance, and tend to secure fair trials on the merits, and to protect parties against the consequences of those little slips, accidents and omissions, which, to some extent, are unavoidable in legal proceedings, but which go not to the merits or justice of the cause in which they occur.

We reverse the judgment, and remand the cause for another trial.

WM. N. BEWLEY and JONATHAN BIBLE v. PETER OTTINGER.

EVIDENCE. *Deposition. Exception. Amendment of caption.* A clerk having sustained exceptions to a deposition, the party by whom it was taken, without praying an appeal, moved the Court to allow the Commissioner to amend the caption, which was done before trial, held to be no error. The deposition was then allowed to be read on the trial, and properly. Code, 2863, construed.

FROM GREENE.

In the Circuit Court, E. E. GILLENWATERS, J.,
presiding.

Wm. N. Bewley and Jonathan Bible v. Peter Ottinger.

NEILSON and DEADERICK, Judges, having been of counsel, did not sit in this cause.

R. M. BARTON, presented brief of T. A. R. NELSON, J., for plaintiff.

R. MCFARLAND and H. H. INGERSOLL, for defendants.

J. T. SHIELDS, Sp. J, delivered the opinion of the Court.

The deposition of Elizabeth Lauderdale, was excepted to, and the exceptions allowed by the Clerk. From his decision, no appeal in form was prosecuted.

The grounds of the exceptions were, that the caption did not show in what cause the deposition was taken, and that the certificate did not show to whom it was delivered.

At the same term of the Court, when the exceptions were filed and allowed by the Clerk, the defendant asked and obtained leave from the Court to introduce the Commissioner before whom the deposition had been taken, and to amend the caption and certificate, which amendments were accordingly made. No exception to this action of the Court was taken, nor was there any further exception to the deposition.

On the trial of the cause, the plaintiff objected to the reading of the deposition on the same grounds that the exceptions were based upon; but the Court being of the opinion that the amendments allowed by the Court had cured the defects, allowed it to be read.

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It is now insisted that this action of the Court in allowing the said deposition to be read, was erroneous, and this is the only question made seriously here.

We think that there was no error in the action of the Court in allowing the deposition to be read, and we affirm the judgment.

It is provided, Code, section 2863, that no summons, writ, pleading, process, return, *or other proceeding*, in any civil action, in any court, shall be abated or quashed for any defect, omission or imperfection. The amendments made in this case come within the spirit, if not within the letter, of this statute, and other statutory provisions on the same subject. We can not doubt that the imperfections for which the depositions were excepted to, being mere accidental omissions to state facts that really existed, may be amended, under the direction and supervision of the Court, by the officer who took the deposition, and who, of course, makes the amendment under his official oath.

It is argued that when the exceptions were sustained by the Clerk, the Court had no power to make any order in relation to the deposition, without an appeal. We do not think so. It may be true that the decision of the Clerk upon the exceptions, was conclusive until appealed from; yet it does not follow that the Court had not the power to allow an amendment. In fact, the decision of the Clerk was correct; if an appeal had been taken, the action of the Clerk would have been affirmed. For this reason, the plaintiff submitted to the decision of the Clerk, and resorted to the only remedy he had, which was to apply to the Court to

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have the defects and omissions in "the proceeding in the civil action" amended according to the facts.

All that could have been obtained by an appeal would have been a review of the judgment of the Clerk, as to whether it was necessary to the validity of a deposition that its caption and certificate should show certain facts. No such review was desired. The judgment of the Clerk was submitted to, and an amendment was sought and obtained from the only source that could grant it. Affirm the judgment.

A. P. MASSENGILL in error v. A. M. SHADDEN.

1. EVIDENCE. *Irrelevant. Bill of Exceptions.* Evidence of a separate act of the defendant in a suit not connected with the one sued upon, is not admissible, and being admitted will be a cause of reversal, though the bill of exceptions does not purport to contain all the evidence.
2. VERDICT. *Proof to support.* The testimony in a cause being legitimate, and making a *prima facie* case, a verdict will not be reversed on a preponderance of proof.

FROM JEFFERSON.

In the Circuit Court, J. P. SWANN, J., presiding.

BARTON & MCFARLAND, for plaintiff in error.

GEORGE ANDREWS, MEEK & GRATZ, for defendants.

TURNER, J., delivered the opinion of the Court.

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There are several errors assigned and relied upon in argument. The consideration of one only, is necessary to a reversal.

This was an action of trespass instituted in the Circuit Court of Jefferson county, by the defendant in error, against the plaintiff in error, for beating the defendant in error with sticks, rocks, clubs, *etc.*, and for forcibly taking from the plaintiff one roan mare—there is but one count in the declaration, to which there is a plea of not guilty. Verdict and judgment for the defendant, for twenty-five hundred dollars, and an appeal to this court.

The facts of the assault and battery, as they appear in the record, are, to say the least, very aggravated, and disolose conduct unbecoming a true soldier.

On the trial, John Newman, a witness for the defendant in error, was permitted to prove "that on the night plaintiff's mare was taken, the defendant, with several others, mounted, came to my house and took both my horses. I know nothing as to the taking of plaintiff's mare."

This was error. The taking of the horses of the witness was an independent, substantive offense, wholly disconnected with the issue to be tried in this case, and the proof of it in no way aided in the ascertainment of the truth of the issue the jury was sworn to try; was calculated to mislead and prejudice their minds, and could produce no reasonable ground of inference as to the fact in dispute and submitted by the pleadings. If this testimony was admissible, the rule as laid down by Starkie on Ev., vol. 1, top 330, margin 371, "That

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one of the main objects of pleadings is, to apprise the adversary of the nature of the evidence to be adduced against him," and that it "is essential to the purposes of substantial justice that such allegations should be supported by corresponding proof," is defeated, pleading holds a useless office in the investigation by suit, of the rights of person and property, and we are blindly at sea.

The bill of exceptions does not recite "that this was all the evidence," and therefore it is insisted in argument, "That if there is any evidence to support the verdict, this Court will not reverse upon the facts." Such is the rule but with limitations, one of which is, as in this case when the Circuit Judge has erred in his rulings of the law, either in the admission of testimony, or in the charge to the jury. The rule is founded in the idea that all things else are rightly done, that the court below committed no error in announcing the law throughout the trial. This being so, this Court will not investigate facts, and reverse upon a preponderance, however great, the testimony supporting the verdict being legitimate, and making out a *prima facie* case.†

Judgment reversed and cause remanded.

† See *Parkey v. Yeary*, ante 157; *Lay v. Huddleston*, ante 167; *Smith v. Carr*, ante 173; *Nance v. Haney*, ante 177.

Joseph Fallwickle and Wife v. G. W. Keith and Wife.

JOSEPH FALLWICKLE and WIFE v. G. W. KEITH and
WIFE.

HUSBAND AND WIFE. *Action by and against.* A joint action by husband and wife can not, in general, be sustained against a husband and wife on promises not in writing, made by the wife of the defendant to the wife of plaintiff. The exceptions are stated in the Code, 2805, 2486. Otherwise as to a writing, 1 Cold., 362; 4 Cold., 3, 370; 1 Chit. Pl., 74.

FROM MORGAN.

In the Circuit Court, L. C. HOUK, J., presiding.

L. A. GRATZ, for plaintiff in error.

D. K. YOUNG, for defendant in error.

FREEMAN, J., delivered the opinion of the Court.

This was an action commenced by warrant in debt, before a Justice of the Peace for Morgan County, by G. W. Keith and wife, Ruth Keith, against Fallwickle and wife. Judgment was given by the Justice for plaintiff, and appeal by defendants to the Circuit Court, where the case was tried by a jury, and verdict rendered for plaintiff for the sum of \$34.44, on which judgment was entered by the Court against defendants. A motion was made by defendants for a new trial, which was overruled by the Court, and an appeal, in nature of writ of error, prayed to this Court.

It appears from the proof in the record, that during

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plaintiff Keith's absence from home, his wife sold to the wife of defendant in error, two feather beds and some quilts, worth about \$32. This was in the latter part of 1863 or 1864. It does not appear from the record, at what time Keith returned to his home, but the suit was not commenced till the 15th of February, 1868.

Several questions have been presented in argument, by counsel on both sides, and in the briefs in the cause, which we do not deem it necessary, at present, to decide.

One question raised in the record is decisive of the case. It is clear from the proof, that Mrs. Keith is now, and was, at the time of sale of the articles to Mrs. Fallwickle, a married woman; and as such, could not sue in a cause of action, such as is shown in this case. 1 Chit. Pl., 74. This general rule, long established, has its exceptions; such as in case of desertion of the wife by the husband, and other cases provided for by the Code, 2805, 2486, and by common law, in case of the husband's banishment, or abjuration of the realm. 2 Kent's Com., 154; or she may sue, together with her husband, on covenants or other engagements entered into in writing with her. *Catron v. Warren & Moore*, 1 Cold. 362; *Lowry v. Naff*, 4 Cold., 370; *Kirby v. Miller, Adm'r*, etc., 4 Cold., 3; 1 Chit. Pl., 74.

There is no pretense that the wife had any separate estate, or any interest, either joint or several, in the property sold, for the price of which the suit is brought. The husband simply proposes to affirm the sale made by her as his agent at the time, or to ratify her act. It certainly could not be held that when an agent sells

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property for another, a joint right of action for the price, accrued to the parties to recover the price. In a court of law, whether the contract be express or implied, or whether it be by parol or under seal, or of record, the suit must be brought in the name of the person in whom the legal interest is vested.† *Gwinther v. Gerding*, 3 Head, 197; 1 Ch. Pl., 3, 4.

The proof in the case most clearly fails to show any joint right of action in the plaintiffs, and as the verdict and judgment is joint in their favor, it cannot be sustained. There is, in fact, no proof on which the verdict can stand.

The right of action shown, if any, is clearly a several and single right in Keith to recover the value of his property, sold by his wife, whose act, in making the sale, he affirms and ratifies by the form of his action.

It is equally clear that no right of action accrued against Mrs. Fallwickle, and that she was improperly sued in this case.

It follows that the Circuit Judge erred in not granting a new trial.

The judgment will be reversed, and the case remanded for such further proceedings as may be had in the Circuit Court.

†See *Wolfe v. Tyler*, ante 313.

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EVIDENCE. PRACTICE. *Witnesses. The Rule.* It is error to refuse, in a civil case, to place witnesses under *the rule*, where it is asked upon affidavit of its necessity.

FROM JEFFERSON.

From the Circuit Court, J. P. SWANN, J., presiding.

J. M. MEEK & L. A. GRATZ, for plaintiff in error.

R. M. MCFARLAND & J. M. THORNBURG, for defendant.

SNEED, J., delivered the opinion of the Court.

This was an action of replevin, tried in the Circuit Court of Jefferson county, which resulted in a verdict and judgment for the plaintiff, from which the defendant appealed. It seems that about thirty or forty witnesses were brought together by the plaintiff and the defendant, to testify as to the identity of a horse, which was the subject of controversy. Upon the trial, the defendant moved the Court to have all the witnesses put under the rule, and presented the following affidavit in support of his motion:

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“The defendant makes oath, that in order to have a fair and impartial trial in this cause, justice requires that the witnesses should be put under the rule. He

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therefore asks an order of the Honorable Court that the witnesses in this cause, be placed under the rule.

(Signed)

“THOS. A. ELMORE.

“Sworn to and subscribed, this August 18th, 1868.

“S. S. McCUISTION.

“Endorsed—Filed August 18th, 1868.

“S. S. McCUISTION.”

This motion of the defendant was disallowed by the court, and the trial proceeded.

This is assigned as error, upon which the defendant asks a reversal of the judgment in this case.

There are other errors assigned; but in the view we have taken of this case, it is not necessary that they should be considered.

The Court is of the unanimous opinion, that it is the legal right of either party litigant before a court and jury, upon good cause, shown by affidavit, to have all the witnesses in the cause against him, kept out of the hearing of such as may be undergoing an examination, and apart from them after their examination, so that they do not hear or know the testimony of those who have preceded them in the witness-box; and that an affidavit, setting forth that justice to the party requires that the witnesses shall be put under the rule, leaves the court no discretion upon the subject.

We are aware that there is a conflict of authority upon this question, both in this country and in England; and that it has been held by respectable authority that it is matter of discretion to allow or disallow such a motion. But we are at a loss to conceive how the “fair trial,” which the law guarantees to the citizen,

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whether his life, liberty or property be involved, can be secured to him without a rigid observance of this rule.

The lawyer who has practiced long in jury causes can not have failed to observe that the practice of permitting witnesses to hear each other's testimony has often resulted in a great and gross abuse of public justice.

Human nature is frail, and that frailty is as often illustrated in the witness-box, as elsewhere.

The witness in an excited litigation often becomes the mere partisan of the litigant whose cause he represents. His solicitude in the cause, and his anxiety to win the verdict, are often no less than those of his friend and summoner, whose life, liberty or property, may depend upon that verdict. He comes to regard the adverse party and the adverse witnesses as his adversaries, and often, with scarce a consciousness of the serious obligation that is upon him, lapses into the conviction that the scene before him is a mere tilt and tourney in which he enters to overturn and countervail the testimony of the adverse party. He has heard the evidence of his own party in regard to the transaction, and, perhaps, he remembers it somewhat differently, but a conflict would be fatal; and he often reasons his flexible conscience into the opinion that his own memory is at fault, and the statement of his confederate is the true version, and he therefore corroborates it. He has heard the testimony of the adverse party, and his ingenuity is taxed at once to strike it where it is vulnerable, and to destroy it. A brief and whispered conference behind the bar, and he finds one of his own party who saw the transaction as he saw it, and the thing is done. Of what value is

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the cross-examination, that most efficacious test of truth, under such circumstances. The witness who is disposed to ignore the truth, may now defy the onset of the most skilful cross-examination. And even he who would fain lean toward an honest story, finds himself confounded, and often yields his own conviction, to adopt the strong, emphatic statements of another.

The object of the trial is to elicit the truth. But, under such circumstances, and in an excited controversy, the truth is as often smothered as disclosed. The order to put the witnesses under the rule, says Mr. Greenleaf, upon the motion or suggestion of either party, is rarely withheld; but, by the weight of authority, the party does not seem entitled to it, as a matter of right. 1 Greenl. Ev., 432. This doctrine, that upon the mere motion or suggestion of a party it does not seem a matter of right, appears to be traceable to the darker ages of English jurisprudence, where, in the case of *Rex v. Cook*, 33 Howell's State Trials, it was said by Lord Chief Justice Treby that it was grantable of favor only, at the discretion of the Court. And this *obiter* of the Lord Chief Justice seems to have been quietly assented to by many of the courts since.

We have no hesitation in declaring that such a doctrine can not stand the test of principle, and that it is utterly incompatible with the perfect enjoyment of the right of a fair trial, guaranteed by the laws to the citizens of this country.

It is stated, as a uniform course of practice, that the Court, on the application of counsel, will order the witnesses to withdraw. 2 Phil. Ev., 395. In *Taylor v.*

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Lawson, 3 C. & P., 543, Chief Justice Best regretted that the rule of parliamentary practice, which excludes all witnesses but the one under examination, was not universally adopted.

But in *Southey v. Nash*, 7 C. & P., 632, Baron Alderson expressly recognized it as the right of either party, at any moment, to require that the unexamined witnesses shall leave the Court. 1 Greenl. Ev., note to § 432. It is said by a distinguished jurist of our own State, that it is considered doubtful whether or not it might be refused by the Court, even if no necessity for it was seen. Car. L. S., § 351. This point was not precisely in judgment in the case of *Nelson v. The State*, tried in this Court, at Nashville, in 1852. The question in that case was, whether the order of the Circuit Judge, pending the trial, permitting the witnesses who had been placed under the rule, to disperse at the recess of the court, and to be again put under the rule when the court resumed its sitting, was an error for which this Court would reverse its judgment.

This Court held that, to be such an exercise of discretion as this Court would not interfere with as exercised in that case. But, say the Court, if the Circuit Judge were to deny the rule altogether, or so practice upon it as to make it inoperative in the face of an express objection of the party, then it would probably amount to error sufficient to authorize the granting of a new trial; because it would be the denial of a right to the party demanding it, that might be very fatal to his cause. 2 Swan, 258.

We have been referred to no adjudication upon this

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question, save in such applications for the rule as were made by mere motion or suggestion, without the grave accompaniment of the oath of the party that the rule was necessary to the ends of justice in the cause. It seems the settled practice everywhere, to grant the rule upon the mere motion of either party; but this is treated as a matter of favor. We go a little further, and hold it to be a matter of right, when, in the judgment of a party, he believes that justice demands that the witnesses shall be put under the rule, and his motion is supported by affidavit. Then it should be allowed, and it is error to refuse it.

Let the judgment be reversed, and the cause remanded for a new trial.

LETHIA M. COOVER v. D. E. DAVENPORT.

1. PROMISE OF MARRIAGE. *By married man.* A contract by a married man with a single woman, to marry her, if accepted by her in ignorance of his condition, is lawful on her part, and she may recover damages for its breach.†

† This point necessarily involves the point that a married man is competent to contract, though not competent to *perform* a contract, to marry. It is true, his contract is void, as to him, not from want of power to make a contract, but because, with full competency to contract in general, he makes a contract which is itself illegal, and impossible for him to execute. Being competent to bind himself, his act binds him, not specifically to perform what would be illegal, but to pay damages for the breach. The adverse party not being *in pari delicto*, is not barred from prosecuting the suit, whereas he would be barred from any suit because of his knowledge of the facts which makes the performance illegal.

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2. **SAME. Same. Plaintiff's knowledge after Contract not a bar.** In an action for breach of promise, proof that the plaintiff, after the contract was entered into, discovered that the defendant was a married man, and did not at once repudiate the contract, but continued to receive the attentions of the defendant, and urged him to procure a divorce, does not bar a recovery, but goes in diminution of damages.
3. **CHANGE OF VENUE. Nearest county.** A change of venue must be to the nearest county, free from the like exception. A cause can only be taken out of the circuit when the county out of the circuit is nearer than any within it, not subject to exception.
4. **SAME. Same. What is.** The nearest county is the one whose county seat is the nearest.
5. **JUDICIAL KNOWLEDGE. Locality, etc.** The Court will take judicial notice of the local divisions of the State, and their relative positions, and the comparative distances of their county seats.

FROM MARION.

In the Circuit Court, to which the case had come by change of venue from Franklin; N. A. PATTERSON, J., presiding, in the Court of Franklin, when the venue was changed, and also on the trial of the cause in Marion County.

TURNEY, J., having been of counsel below, did not sit in this cause.

R. M. BARTON argued the cause for the plaintiff, and presented the brief of TURNEY, J., which cited Code 2839, 1 Pars. on Contr., 548; Chitty on Contr., 468; Addison on Contr., 678.

A. S. MARKS, MAYNARD and WASHBURN, for defendants. Marks cited 2 Pars. on Contr., 67; 2 Greenl. Cruise, top p. 507; Hil. on Torts., 152; Peake N. P. C., 240.

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E. C. CAMP with them, to show the contract invalid, cited 4 Bac. Abr., side p. 550; *Harrison v. Cage*, 1 Ld. Raym., 587, Bouv. Law Dict., title Promise of Marriage, 2 vol., 392; 7 Johns, 36.

He insisted that both parties must be bound, or neither is liable, citing 1 Caines, 483; 12 Johns, 190, 397.

NICHOLSON, C. J., delivered the opinion of the Court.

In January, 1864, defendant made the acquaintance of plaintiff, at the house of her father, in Franklin County, Tennessee. He came from Paducah, in Kentucky, and settled in Franklin County, where he owned a large, real and personal estate. He was a married man, but left his wife at Paducah. Plaintiff graduated at the Winchester Female Academy, in 1849 or 1850. She was poor, but of good character and respectable family. For several months after his acquaintance commenced, he was a frequent visitor at her father's house. The result of these visits was, that in April, 1864, defendant became so much enamored of plaintiff, that he made formal proposals of marriage. Although she returned the attachment, she declined to accept or to reject his proposals. He pressed his suit until July, 1864, when he wrote to her, repeating his "warm and sincere love," and assuring her that "one word would make him the happiest man in Tennessee," and insisting on having her decided answer. To this letter, she responded; and on the 12th of July, 1864, he acknowledges its receipt, and says its "contents are sweet to me." The fair inference is, that in that letter, for the first time, she accepted his proposal of marriage. In further answer to her letter

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he proceeds to say: "And with all said, the subject you approached me with, and as often I have evaded, shall in this be explained. I will try to explain to satisfy you. I always told you I was free—do not get vexed at me—I thought I was free forever. One year ago, we agreed to separate. All things were fixed—papers were all arranged, but not signed. I was indifferent about it, as at that time I never expected to marry again. She came up last spring, and agreed to have them fixed up, and I felt well about it, and spoke of it to you. Well, I sent down to my lawyer, in Paducah, to have those papers signed and sent to me. When I came to Nashville, I got a letter from my counsel, that he could not get her to sign the papers. * * Lethia, it shall be fixed all right, but you keep things still for a while; things will all come right in good time. I shall remain yours, let it cost what it may, and I pray God that you will remain the same to me. * * If you should look at this thing any different to what you have, or from what I do, I hope you will forgive me, and if nothing more, let me be your friend, and look after your welfare."

This letter discloses the fact that he had secured the affections and won the confidence, and procured the favorable response of plaintiff, to his proposals of marriage, by the false and fraudulent representation, that he was free to make a marriage contract. It discloses, also, that he had made known to her the fact of his having been married, and that an arrangement had been made by which he was free from his former obligations. The knowledge of these facts furnishes a probable explanation

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of the hesitancy of plaintiff, from April to July, in responding positively to his proposals.

It is fairly deducible from this letter, that plaintiff accepted his proposals, under the belief that he was in a condition to make the contract, and that she was now informed, for the first time, that he had misrepresented his true condition. But it will be observed, that whilst he confesses that he had deceived her, he assures her that "things will all come right in good time," and begs her to remain the same to him, and assuring her that she was the only one he ever loved so dearly. These assurances, that "things would come right in good time," and that he desired her "to remain the same to him," and his protestations of ardent love, were evidently intended to induce her to continue the engagement, notwithstanding the obstacle then in his way, to their marriage.

He was successful in inducing her to adhere to her promise, to marry him. She met with him at Nashville, and soon afterward wrote to him, renewing, in terms entirely satisfactory to him, her pledges of fidelity and devotion. On his part, he renewed by many letters, in quick succession, his determination to be immediately freed from his obligations to his wife; and on the 23d of Sept., 1864, left for Paducah, assuring her that on that trip he would be made free, and that in a few days he would return, and then they would "have their bliss," signing himself, "your loving *husband* or I will be in a short time."

Defendant's visit to Paducah failed to remove the obstacle to the consummation of the "bliss" which he so

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confidently assured plaintiff was in store for them. But failure and disappointment were only followed by renewed assurance of ultimate success, and of unabated devotion on his part, whilst she submitted with fortitude to her fate, growing stronger and stronger in her confidence in and her devotion to him, but manifesting at times decided impatience at the delay. Completely absorbed in her love for him, and never doubting his sincerity and truth, she was completely under the dominion of her passion for him. On the 2d of April, 1865, she writes: "Dearest Eugene: There is for us a crisis approaching. Well did you truly remark, the struggle had come. It is upon us in good earnest. I *implore* you by all that you hold sacred, by your *great love* for your devoted Lethia, to *finish up immediately*, without *one moments delay*, that affair in Kentucky. Let it cost what it may. If it cost all that you have, let it go. Let you but return to me and say, Lillie, it is *finished*, and I will be ten thousand times more happy than I would be if you were to say Lillie, I am a millionaire. Rather than have things take the turn I see they are taking, I would rather live in a log cabin with a dirt floor and eat hog and hominy. Pride has ever been my weak side."

On the 2d of July, 1865, she addressed to him a long letter, abounding in passionate ebullitions of love and sadness, mingled with extensive extracts from works of poetry and fiction; and again, on the 7th of July, 1865, she writes to him in the same strain of confiding passion and devotion. On the 16th of July, 1865, he writes to her; and after repeating his devotion, he says: "I

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have spoken things that were not true—you know what it was done for—it was done for this, to forward our marriage and get rid of one that I hate.” On the 18th of July, ’65, he writes to her: “I am going to Paducah this week, to finish up all my business, I hope, never to return again.” And on the 19th of July, 1865, he writes to her again, and says to her: “I shall, I think, leave Nashville some time this week. I think I can get all my business settled up by the 5th of August, and you and I start on our tour by the 16th of August; I hope so at least. I think *her coming up to Decherd* will speed our *happiness*.”

The correspondence was kept up in the same strain until November, 1865, plaintiff never wavering in her passionate devotion; and defendant repeating in his frequent letters his ardent love, and renewing the assurances that all would be right. At his request, she had withdrawn from society, and was living in secluded retirement. She thus gratified him, and cut herself off from communication with all except him. He closed his last letter, dated Nov. 2, 1865, by saying: “I can not part with you, nor do I intend to. Things will come all right. Keep up good cheer; do not let your heart fail in the last hour of trial.”

In July, 1865, plaintiff having abandoned all hope of the fulfillment of his contract by defendant, commenced an action of trespass on the case for breach of marriage promise, in the Circuit Court of Franklin county.

After pleadings were made up, the defendant filed affidavits and moved the Court to change the venue, which

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motion was sustained; and the Court thereupon ordered the cause to be transferred to Marion county for trial. Exception was taken to this order of the Court by the plaintiff.

After the cause was transferred to Marion county, plaintiff filed affidavits and moved the Court to transfer the cause back to Franklin county, which motion was overruled, as well as a motion afterwards made to strike the cause from the docket; to all which action of the Court the plaintiff excepted.

At the March Term, 1869, of the Marion County Circuit Court, the cause was tried, and a verdict returned for the defendant, upon which there was judgment. Upon the discharging of a motion for a new trial, the plaintiff appealed in error to this Court.

The most important question in the case is, whether there was error in the charge of the Circuit Judge to the jury, in view of the facts given in evidence. That portion of the charge on which the question is raised, is as follows:

“If the plaintiff was legally free to contract and consummate marriage, and the defendant was not, because of a then existing marriage, and the parties entered into such a contract, the plaintiffs having no knowledge of the defendant’s disability to consummate it, the defendant would be liable, * * * * But to authorize a verdict for the plaintiff under this last stated proposition, the testimony must show the plaintiff to have acted in legal good faith—she must have been wholly ignorant of the want of legal ability, on the part of the defendant, at the time of the contract; and, if afterward, it came to her knowledge, and she took steps, or sought

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in any way to procure or secure its execution, or gave her consent thereto, knowing its illegality, she would thereby so place herself in the wrong, as to require her exclusion from Court. In such case, the law would require you to find the issues in favor of the defendant."

There are three counts in the declaration; the two first allege that plaintiff being unmarried, at the special instance and request of defendant, promised to marry the said defendant, and the defendant then and there promised to marry the plaintiff; the first count alleging in a reasonable time, the second count omitting any allegations as to the time of marriage, &c. The third count alleges, that, in consideration that the plaintiff being sole and unmarried, at the request of the defendant, who falsely and fraudulently represented himself to be sole and unmarried, promised defendant to marry him within a reasonable time; and the plaintiff, confiding in defendant's promise and undertaking, has hitherto remained unmarried, and has always been ready to marry the defendant, until she had notice he was a married man; and the plaintiff avers that the defendant has not married her, but on the contrary, at the time the defendant made his promise, he was married, and still is married, to another woman."

The evidence in the cause proves that the contract of marriage was made in July, 1864, and that, at the time, defendant was a married man, but represented himself to be unmarried, and that the fact of his being, at the time, a married man, was not known to plaintiff. Upon these facts the Circuit Judge charged the jury

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correctly, that plaintiff would be entitled to recover. But he added, if afterwards it came to her knowledge that he was a married man, and she took steps or sought in any way to procure or secure the execution of the contract, or gave her consent thereto, knowing its illegality, she would thereby exclude herself from court. If we rightly comprehend the language of the Judge, he intended the jury to understand that, although the plaintiff would be entitled to recover if she was ignorant of defendant's being married, yet, if she did not repudiate the contract when she obtained knowledge that he was a married man, she would not be entitled to recover.

To apply this charge to the facts before the jury: It was in proof that, early in July, 1864, the contract was expressly made, though for several months the proof shows that there was an implied promise on both sides. As plaintiff did not know that defendant was married, it was a lawful contract on her part, and she was entitled to damages for its breach. But the proof further showed, that in a short time after the making of the express contract, plaintiff was apprised of the fact that defendant was a married man; and the jury was instructed that, if upon obtaining this knowledge, she did not repudiate the contract, but was still willing to carry it out in a reasonable time, she would thereby forfeit all right to recover. Whatever may be our views, as a question of propriety and morality, as to the course plaintiff ought to have pursued when she obtained knowledge that she had made a contract of marriage with a man who was then disabled from executing the contract by reason of his being then married, we do not under-

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stand that she forfeited her right to damages, by waiting a reasonable time to see if he might not be able, lawfully, to execute his contract.

In 2 Saunders on Pleading and Evidence, 347, a declaration is set out, of which the declaration in the present cause is a copy, on which the plaintiff obtained a verdict. "On motion to arrest the judgment, held, that the declaration showed a sufficient consideration.

Wild v. Harris, 13 Jur., 961; 18 L. J., 297, C. P.; held, also, that the defendant's promise was not unlawful, there being, at the time the promise was made, a possibility of performance, as the defendant's wife might have died within a reasonable time. *Ib.* Held, also, that the allegations that the plaintiff remained unmarried for a reasonable time, was a sufficient consideration, as being a prejudice to her, caused by the conduct of the defendant." *Ib.*

In Chit. on Contr., 468, is laid down that "the promise of a man to marry within a reasonable time, is not void, although he was married at the time of making such promise, because his wife might have died within a reasonable time."

Whilst we can not yield our assent to this doctrine in its full extent, we do approve the doctrine found in Addison on Contracts, 678, that "if the party making the promise, was married at the time it was made, and consequently, incapable of entering into the contract, or of performing it, the incapacity constitutes no excuse for non-performance, unless it was known to the other contracting party at the time the promise was made and accepted."

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It is clear, that when plaintiff obtained knowledge that the defendant had not the capacity, by reason of his having a wife, to execute his contract, after waiting a reasonable time, she could have sued and recovered for a breach of the contract. To such an action, defendant could not have made the defense that he was married, when he made the promise, for the purpose of defeating the action. If defendant could have defended such an action, brought within the time for the limitation of actions on the case, by showing that after she had knowledge of his being married, she consented to the continuance of the contract, or took steps to procure its consummation, such proof could only have been legitimate in mitigation of damages, but not to defeat her right of action. 2 Saund. Pl. and Ev., 348.

But to determine whether the plaintiff forfeited her right to recover full damages, by an unreasonable delay in suing, or by any conduct beyond the simple delay, it is necessary to look to the facts as they existed at the time she learned that defendant was a married man, and to the circumstances which controlled her in delaying her action. It will have been seen by the history of the case, as we have given it, that it was not until the plaintiff had expressly accepted his proposal of marriage, that he communicated to her the fact that he was not then free to marry her. He withheld this fact from her, until, by his persistent appliances, he had secured her affections and her confidence. He had told her that he had been married, but he had also assured her that he was then free to marry again. But after

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he became satisfied that he was secure in having won her love and her confidence, he disclosed to her the fact, that he was not then free to marry her, as he had before thought, and as he had told her he was, but that he was not free from his wife, simply because from oversight or negligence, the papers for their separation, which had been prepared and agreed on, had not been executed. He assured her, in substance, that this was a mere matter of form; that he would have no trouble in arranging it. She confided in and believed him. It is possible that he was honest in these assurances, but whether he was acting honestly or fraudulently, she believed his statements, and doubted not, that within a short time, the slight obstacle in the way of the marriage, would be removed. In her situation, it was not probable that she would suspect the fraudulent device to which he was resorting, to continue the dominion which he knew he had acquired over her. From the moment she yielded to him her heart, and agreed to become his wife, she became an easy victim of his misrepresentations. When he wrote to her, that he would soon be free to marry her, she believed him, because she loved him, because she was already *in vinculis*.

To hold that she lost her right to full damages by delaying to sue under such circumstances, would be to hold that defendant could avail himself of his fraud in procuring her to delay, in order to relieve himself of his liability for damages for the original fraud in procuring from her a promise of marriage. So far from being

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relieved from the liability growing out of his original fraud, by exerting his power over her to induce her not to repudiate the contract on her part, he estopped himself from relying on such a defense, if she delayed at his urgent request, or if she did so in consequence of his false and fraudulent representations. His conduct, if fraudulent, in procuring her to continue her promise, after she knew that he was married, would be an aggravation of his fraud, in imposing upon her ignorance in the first instance.

By reference to the history of his conduct from July, 1864, to the close of the next year, it is in proof, that day after day, week after week, and month after month, he continued his efforts, by urgent and passionate appeals, and by a succession of false promises, operating upon her hopes, to still further influence her passions, and to induce her not to repudiate her engagement. This artful and effective scheme of influencing the plaintiff, situated as she was, seems to have been successfully practiced down to his last letter in November, 1865, in which he still repeated his assurances of an early consummation of their hopes, and his urgent request that she should adhere to her promise. During all this time, her passionate devotion to him, whilst it blinded her to his fraudulent devices, subjected her to his constant and continuing influence. Under such circumstances, it was error in the Circuit Judge to tell the jury that plaintiff must be excluded from Court if she failed to repudiate the contract, upon learning that defendant was a married man. The jury ought to have been left to determine the fact, whether

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she was not induced to continue to assent to and recognize the contract by the influence exerted over her by the defendant.

They ought to have been told that if, after she learned he was a married man, she freely and understandingly, and uninfluenced by fraudulent misrepresentations, consented to the continuance of the contract, or took steps to secure its consummation, they might look to such facts in mitigation of damages, but that such proof would not defeat her right of action. In charging that such proof would exclude her from Court, and defeat her right to recover, there was clear error.

In the next place, it is insisted for the plaintiff that the Circuit Judge erred in ordering the venue to be changed from Franklin to Marion county. The affidavits, on which the venue was changed, state that defendant could not have a fair trial in Franklin county, on account of the prejudice existing against him in that county; but they do not designate any of the adjoining counties as being subject to like exceptions. It is to be presumed, therefore, that none of the adjoining counties were subject to the like exceptions. Upon determining that the affidavits of the defendant and his other witnesses were sufficient for a change of venue, it was the duty of the Judge, under the law, to send the cause "to the nearest adjoining county, free from like exceptions, whether in the same judicial circuit or out of it." Code, 2839. The fair interpretation of the law is, that the venue should only be changed to a county out of the circuit, where such county was the nearest, free from like exceptions. If the nearest county should be in the

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circuit, but should not be free from like exceptions, then the venue might be changed to a county out of the circuit, not subject to like exceptions. But in the present case, none of the adjoining counties were shown to be subject to like exceptions, and, therefore, it was imperative on the Judge to send the cause to the nearest county.

This raises the question: "Was Marion county the nearest county to Franklin, and how was the judge to determine the fact? The Judge could take judicial notice of the local divisions of the State into counties, cities, towns, and the like, and of the relative positions of such local divisions. 1 Greenl., § 6. He was bound, therefore, to know, judicially, that Coffee, Lincoln and Grundy counties, in the same circuit, and Bedford and Marion counties, not in the same circuit, were all adjoining counties to Franklin. The law required him to send the cause to the nearest of these five counties. What is meant in the statute by the nearest county? In one sense, none of them are nearest, as all are adjoining to Franklin. We must interpret the language so as to carry out the object of the Legislature. The object most clearly was to require the Judge to accommodate his action to the convenience of the parties and witnesses in the cause. This was to be done by sending the cause to the nearest county, meaning that county whose Court-house was nearest to that of Franklin county. He knew, judicially, or ought to have known, that the Court-house of Marion county, instead of being the nearest, was the most distant of the five adjoining counties; and for that reason, as well as on account of

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the character of the country, the most inconvenient for parties and witnesses. It was, therefore, error to transfer the cause, for trial, to Marion county.

It is also insisted that the Circuit Judge erred in overruling the motion of plaintiff to transfer the cause back from Marion to Franklin county, under the provisions of the Act of 1867, c. 36, s. 8. We should hold that there was error in overruling this motion, but for the fact stated in argument by defendant's counsel, that this Act had been repealed by an Act passed on the 12th of March, 1868. We know, judicially, that the Circuit Court of Marion county commenced its March Term, 1868, on the second Monday of that month, which was the 9th day thereof; but the record fails to show on what day of the term said motion was made and overruled. We think it probable that the motion was overruled before the Act of 1867, c. 36, s. 8, was repealed; but as there is some uncertainty as to this fact, and as the decision of this alleged error is unimportant, we do not decide it.

For the errors indicated, the judgment below is reversed, and the cause remanded to the County of Franklin, for a new trial, and with instructions to the Clerk of the Circuit Court of Marion county to transmit, without delay, all the original papers, and the orders made in the cause, to the Clerk of the Circuit Court of Franklin County.

Sarah Coffin, &c., v. Joseph A. Hill.

SARAH COFFIN, for the use of ALEX. STEWART, in
error, v. JOSEPH A. HILL.

1. CURRENCY. *Note payable in.* Upon a note payable "in the currency of the country, but not in Confederate notes," the recovery will be for the value of such notes as constituted the actual circulation of the country at the maturity of the note, though greatly depreciated below par.
2. SAME. *Onus of proof to show depreciation.* On such a note the presumption is, that the currency is at par, and the plaintiff will recover the number of dollars called for, unless proof is introduced to show that the currency was depreciated, and how much.
3. CASES CITED. *Hopson v. Fountain*, 5 Hum., 140; *Baker v. Jordan*, 5 Hum., 485.

FROM COCKE.

In the Circuit Court, J. P. SWANN, J., presiding.

McFARLAND and THORNBURG, for plaintiff, cited King's Dig., 1082, 3575-9; 1 Sneed, 141; 2 Sneed, 275; *Allen v. The State*, 3 Hum., 367; and insisted that bank notes at 50 per cent. discount, as was the case here proved, were, in no proper sense, current.

J. M. MEEK and L. A. GRATZ, for defendants, insisted that what was "currency" was matter of evidence as to what actually circulated. E. C. CAMP, with them.

NICHOLSON, C. J., delivered the opinion of the Court.

This cause commenced before a Justice of the Peace, in Cocke County. Judgment was given for the plain-

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tiff below, and an appeal taken by him to the Circuit Court. Upon the trial in the Circuit Court, the plaintiff read to the jury the following note:

“\$180.

“On or before the 1st day of January next, I promise to pay to A. W. Rhea, one hundred and eighty dollars, in the currency of the country, but not in Confederate notes, for value received. Sept. 26, 1863.

“J. A. HILL.”

On the back of the note were indorsed several small credits, and an assignment thereof to the plaintiff.

After reading the note to the jury, the plaintiff closed his case.

Defendant introduced witnesses who proved that on the 1st of January, 1864, besides Confederate money, there were bank notes and some greenbacks in circulation in Cocke County; that there was but little of the greenback currency in circulation, and not enough to furnish a currency; that there was more bank notes in circulation than anything else beside Confederate money; that the bank notes, compared with greenbacks, were at a discount of about fifty per cent.; that the greenbacks were mostly laid away, and not put in circulation.

Plaintiff then introduced a witness who testified to the same facts, substantially, as the witness for defendant.

Plaintiff's counsel requested the Circuit Judge to charge the jury that currency meant that which was passing at or about par; and that bank notes which passed at a shave and were taken in ordinary transactions at a considerable discount, were not currency, which

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the Judge refused to charge, but charged, that in the event the jury found the matters in controversy in favor of the plaintiff, their verdict should be for the value of the amount called for in the note, in the currency of the country, at the time the note became due." To this charge the plaintiff excepted, and upon the overruling of his motion for a new trial, appealed in error to this Court.

The only question for our determination, upon the bill of exceptions, is, as to the proper construction to be placed upon the words, "one hundred and eighty dollars, in the currency of the country, but not in Confederate notes," used in the note sued on. This Court has been repeatedly called on to construe contracts in which the expression, "current bank notes," has occurred; but after a careful examination of the several cases, we are unable to deduce from them any determinate rule that is decisive of the present case. In the case of *Hopson v. Fountain*, 5 Hump., 140, the expression was, to pay "in current bank money of the State of Mississippi, the sum of \$293." The Circuit Judge held that the word had a technical legal meaning, signifying "money, dollars and cents of constitutional currency, *i. e.*, gold and silver." This Court reversed the holding of the Circuit Judge, saying: "We cannot consent to the correctness of the definition of the word 'money.' It is a generic term, embracing, according to the subject matter of the discourse of writing, every species of coin or currency, etc.," and it was held that the measure of damages in that case, was the value of current Mississippi bank notes, where the covenant

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was payable. In the case of *Baker v. Jordan*, 5 Hump., 485, the expression was "to pay \$2,821 in current Tennessee bank notes." This Court held that "the words 'current bank notes,' mean that which circulates currently as money, and which, in the absence of proof to the contrary, is presumed to be of value to money," but which presumption the defendant may rebut by proof.

In the argument of this cause, the counsel assumed that the terms "currency" and "current bank notes," are synonymous; and in this, we think, they are correct. The contract is to be construed, then, as if the language had been, "payable in the current bank notes of the country, but not in Confederate notes." This last expression, "but not in Confederate notes," seems to designate the meaning attached by the parties themselves to the term "currency of the country," making it clear that the defendant understood himself as agreeing to pay, and the plaintiff as agreeing to receive "current bank notes of the country." In this view, the remarks of Judge Green, in the case of *Baker v. Jordan*, already quoted, appear to the Court to be applicable to this case. The expression, payable "in the currency of the country," means payable in those bank notes which might circulate currently as money, when the note became due. Bank notes so circulating would be presumed to be of value equal to money. Hence, in this case, if upon the trial, when the plaintiff read his note and closed his case, the defendant had introduced no proof rebutting the presumption, that current bank notes were equal in value to money, the plaintiff

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would have been entitled to a verdict in dollars, for the amount of the note. But the defendant introduced such proof without objection; and the Judge charged the jury substantially in accordance with the law as herein declared. There is no error, and we affirm the judgment.

RODHAM CHESNUTT, Ex'r OF SAMUEL CHESNUTT, dec'd,
 plaintiff in error, v. WILLIAM MCBRIDE.

1. ADMINISTRATION. *Limitation of two years. Request for delay.* In a suit against an administrator or executor, a finding by a jury "that demand was made by plaintiff in the month of December, 1868, and *delay requested* at said date," is not sufficient to stop the running of the statute of two years.
2. SAME. *Same.* Proof that plaintiff told defendant that he would like to have his claim settled, and the defendant replied, "hold on, your claims are good," will not stop the running of the statute.

Code construed, 2784, 2785; act of 1789, c. 23, s. 4.

Cases cited: *Trott v. West*, 9 Yerg., 335; *Puckett v. James*, 2 Hum., 566; *F. & M. Bank v. Leath*, 11 Hum., 517; *McKizzack & Co. v. Smith*, 1 Sneed, 472; *Birdsong v. Birdsong*, 2 Head, 603; *Byrn v. Fleming*, 3 Head, 663; *State v. Crutcher*, 2 Swan, 514.

FROM HAWKINS.

In the Circuit Court, E. E. GILLENWATERS, J., presiding.

S. J. KIRKPATRICK, for plaintiff in error, insisted that the constitutional amendment of 1865 was invalid;

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that the request was insufficient, and cited *Trott v. West*, 9 Yerg., 433; S. C. Meigs' R., 163.

R. M. BARTON, for defendant in error, insisted that the amendment was valid and operative, and that the defendant in error had two years and six months from 1st January, 1867, to sue.

NELSON, J., delivered the opinion of the Court.

Four suits were brought by the defendant in error, on the 26th day of April, 1869, before a Justice, against the plaintiff in error, upon notes executed by his intestate, in his life-time, and severally bearing date March 1, 1856, August 1, 1859, and August 1, 1860. Judgments were rendered against the plaintiff in error, from which he appealed to the Circuit Court of Hawkins county; and, in the progress of the causes, an agreement, in writing, was executed by the parties, from which it appears that they agreed that the causes might be tried with or without a "jury, at the election of the Court, that judgment should be rendered in favor of the plaintiff," in accordance with the face of the notes sued on, or in accordance with the kind of money called for in the notes; that no other defense should be relied upon, except the statute of limitations in favor of executors and administrators; and that nothing contained in the agreement is to be construed as preventing either party from appealing to the Supreme Court in said causes.

The case was submitted to a jury, and judgment was rendered in favor of the plaintiff, on three of the notes, which were payable "in silver," for the aggregate sum of

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\$403.27, in silver coin of the United States of America, and on the remaining note which was payable in dollars, for the aggregate sum of \$195 and costs; from which judgment an appeal was taken by plaintiff in error to this Court. The bill of exceptions shows that the jury were sworn "well and truly to try the fact as to whether demand had been made by the plaintiff of the defendant, for the payment of the notes in controversy, and at what time, and if defendant had requested plaintiff to delay enforcing the collection of the same." The jury found "that demand was made by the plaintiff in the month of December, 1868, and delay requested, by defendant, at said date." The parties were the only witnesses in the case. William McBride stated that, on the 9th day of December, 1868, while defendant was at plaintiff's house on business, he told defendant he would like to have his claim settled, and defendant replied, "hold on, your claims are good," whereupon, plaintiff delayed enforcing the collection of the same, until the bringing of this action. Rodham Chesnutt, the defendant, stated, among other things, that he entered upon his duty as executor of S. Chesnutt, on the 7th day of July, 1862; that he knew of these notes of plaintiff's, and had talked with him about them, and had told plaintiff two or three times, they were good, but never requested him to delay enforcing the collection. "The Court decided that the law is with the plaintiff, and that the notes are not barred by the statute of limitation as pleaded."

It may be inferred, from the record, that both parties are citizens of the State, and that, if the creditor was bound to sue within two years and six months,

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the time expired on the 7th of January, 1865; but it is insisted that, under the amended Constitution of the 22d of February, 1865, and the act of the 30th of May, 1865, c. 10, taken in connection with the provisions of the Code, there was a request for delay sufficient to prevent the operation of the statute of limitations in favor of personal representatives, and that, upon this ground, the judgment of the Circuit Judge is correct. But we are of opinion that, without determining whether, after the bar of the statute has been formed, a cause of action can be revived and the remedy extended by constitutional amendment or legislative enactment,† the facts presented in this record do not sustain the verdict and judgment of the Court below, according to the long established course of decision in this Court. Sections 2784 and 2785 of the Code, are substantially the same as the act of 1789, c. 23, s. 4, C. & N., 75; and in construing the last named statute, it was declared by Judge Reese, *Trott v. West*, 9 Yer., 435, that "the suit, after demand is made, must be delayed by the request of the administrator, not vague, not indefinite, not to be implied or inferred merely, but special;" and "that the special request shall stipulate for special delay for a definite time of indulgence, during which the statute shall not bar the claim." In that case, it was held that payment, by an administrator, of part of the demand, and a promise to pay the balance soon, were not equivalent to a special request, or suffi-

† This question has since been determined in *Girdner v. Stephens*, ante 280.

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cient evidence from which to infer, or presume, a special request. *Ib.*, 436. In *Puckett v. James*, it was held that, where it was ascertained there was not assets to pay all the debts, without resorting to the land and negroes, a request of the creditor, by the executor, to suspend the debt until the land was paid for, was sufficiently specific. 2 Hum., 566, 567. In *F. & M. Bank v. Leath & Mathews, Ex'rs*, the two previous cases were cited with approval; but, in further expounding the statute, it was held that, if there was a special request for delay and there was a delay, it should be inferred that the delay was in consequence of the request. 11 Hum., 517. In *McKissack & Co. v. Smith*, 1 Sneed, 472, 473, the cases of *Trott v. West*, and *Puckett v. James*, were reviewed, and it was said that "if the question were an open one, it might, perhaps, admit of some doubt whether, in the exposition of the proviso to the fourth section of the Act of 1789, it is not going very far to hold that, by a special request for delay, is meant a stipulation for delay, for a *definite time* of indulgence;" and it was held that a request to delay until the representative can collect the debts of the estate, or until he can collect money, is a special request and for a sufficiently definite time; but, in that case, it was held that a mere promise "*to pay soon*," was too vague and indefinite. In the case of *Birdsong v. Birdsong*, 2 Head, 603, it was determined that where one half of the debt was paid and a promise by the administrator to credit a note due the estate, for so much of the balance as might be just, not admitting it all to be so, was not a request for delay for any time, or until any

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event. In *Byrn v. Fleming*, 3 Head, 663, the question being then directly presented for the first time, it was held that if proper and effectual steps be not taken within the time limited, by the personal representative, to enforce satisfaction of a claim, in his own favor, upon the estate, he will be barred, as in case of other creditors failing to sue within the proper time. And, in the *State v. Crutcher's Adm'r*, 2 Swan, 514, it was held, by a majority of the Court, McKinney, J., delivering the opinion, that even the State is barred by the statute of limitation, in favor of executors and of heirs.

In the case now under consideration, the evidence before the jury that the administrator, when requested by the creditor, to have his claim settled, said "hold on, your claims are good," can scarcely be considered as a special request to delay the suit, and certainly is not a request to delay, for any definite period of time, or a request dependent upon the happening of any certain contingency; nor does the finding of the jury that, when demand was made, the plaintiff requested delay, satisfy either the requirements of the statute or any of the former decisions of this Court. It does not show a special request to delay for a definite time of indulgence, or for any period that can, by reasonable intentment, be reduced to certainty. The assurance that the debt was good, involved no promise to pay it. Such a statement might be made with perfect truth, in regard to any solvent estate, within the time allowed by law, for prosecuting claims against it; and yet, if the creditor, who is presumed to know the law, failed to pursue his remedy, within the time prescribed by it,

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there is no saving in the statute sufficient to embrace his negligence.

This view of the case saves the necessity of determining the other interesting and important questions raised in argument for the plaintiff in error, in regard to the amended Constitution of 1865, and the statute of limitations.

Let the judgment be reversed.

S. D. MINOR, Adm'r, &c., v. T. S. WEBB, Adm'r *de bonis non*.

ADMINISTRATOR. *De bonis non*. Six months to sue. An administrator, who becomes such on the death of the original administrator, is exempted from suit for six months from his qualification. It is otherwise, where the former administrator resigns. Code, 2274, 2237.

Case approved and distinguished from this case, *Coleman v. Raynor*, 3 Cold., 26.

FROM KNOX.

Debt from the Circuit Court, E. T. HALL, J., presiding.

W. P. WASHBURN, for plaintiff, cited *Atkinson v. Brooks*, 10 Yer., 484; 3 Cold., 25.

T. S. WEBB, for defendant, insisted on the distinction between an administrator *de bonis non*, and the suc-

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cessor to one who resigns, and cited *Coleman v. Rayner*, 3 Cold, 25, 29; 1 Bouv. L. D., 82; 2 Bl. Com., 506.

NICHOLSON, C. J., delivered the opinion of the Court.

This is an action of debt, commenced in the Circuit Court of Knox County, by plaintiff against defendant, as administrator *de bonis non*. Defendant pleaded in abatement, that the suit was commenced within six months after his qualification as administrator.

Plaintiff demurred to the plea, because it does not allege that the suit was brought within six months after the qualification of his predecessor. The Court overruled the demurrer, and the plaintiff declining to reply to the plea the case was abated.

The question raised is, whether an administrator *de bonis non* is exempted by the statute, from suits, for six months after his qualification, in the same manner that the original administrator is exempted.

The solution of this question depends upon the construction of the words "executors and administrators," as used in the Code, 2274. The language of that section is, "executors and administrators shall have six months from the date of their qualification, to ascertain the situation of the deceased's estate, and to arrange and settle it without being liable to suit and costs," &c.

The words "executors and administrators," include "administrators *de bonis non*." *Shackelford v. Runyan*, 7

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Hum., 141. They include all administrators. *Coleman v. Raynor*, 3 Cold., 26.

In the last named case, it was decided that an administration, granted upon the resignation of the original administrator, is a continuation of the original administration, and for that reason, the time, from which the exemption from suits commences, is the date of the qualification of the original administrator. But the Court declines to decide whether the same rule obtains in the case of an administrator appointed to succeed a deceased administrator. They confine the definition of an administrator *de bonis non*, to one who is appointed upon the death of the original administrator, whilst they designate one appointed to succeed a resigning administrator as a statutory administrator; but whether there is any distinction between the character, rights and liabilities of the two kinds of administrators, they do not determine. They conclude, that the reason of the act, exempting administrators and executors from suit and cost for six months, does not apply to the latter class of administrators, because, as the resigning administrator is required to settle and pay over to the new administrator the balance of money, property and effects in his hands, he is furnished with information touching the situation of intestate's estate, immediately upon taking upon himself the administration thereof.

We concur in this reasoning, and in the conclusion that the provisions of the Code, 2274, do not apply to the case of an administrator whose predecessor has settled with the County Court, and has delivered over the assets in his hands to his successor. Although the gen-

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eral language of the Code, 2274, embraces and includes this kind of administrator, yet this section, and section 2237, providing for the resignation of an administrator and the appointment of his successor, must be construed together; and upon such construction, we think it was not the intention of the Legislature, that an administrator, appointed in pursuance of section 2237, should be exempted from suits for six months from his qualification. But there is no statute providing for the appointment of successors to administrators who may die before they have closed their administration. As already shown, they fall within the language of the Code, 2274, and unless satisfactory reasons to the contrary can be found, they are exempt from suits for six months after qualification, in like manner as the original administrators. No such reasons are to be found in any other provisions of the Code, the reason applying to appointments under section 2237, having no application, but, on the contrary, the same reasons usually exist for exemption from suits, in cases of administrators appointed to succeed deceased administrators, as in cases of the original administrators. The exemption is given, in the latter case, to enable them to ascertain the situation of the estate of the deceased, and to arrange and settle it without being liable to suit and costs. In most cases, it is equally necessary that an administrator, appointed to succeed a deceased predecessor, should have time to ascertain the situation of the unadministered estate, as that the original administrator should have it. As the Legislature has made no distinction on this subject, between the two kinds of administrators, we are justified

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in concluding that no distinction was intended to be made; and, hence, that an administrator who becomes such, on the death of the original administrator, is exempted from suit for six months from the date of his qualification.

This construction may result in occasional inconvenience and delay, in the settlement of estates, but it is a result which can be remedied only by the Legislature.

There was no error in the Court below, and the judgment is affirmed.

JOSEPH H. CLINE v. GEORGE W. GAUT.

FORMER JUDGMENT. *Jurisdiction.* A former judgment of a Justice of the Peace in replevin being set up in defense to a later replevin in Court, it was objected that it did not appear that the justice had jurisdiction of the first replevin because there was nothing to show that the value of the property was not above one hundred dollars, the judgment being prior to the Act of 1865-6, c. 51. Held, that the justice having taken a bond for two hundred dollars (double value) sufficiently ascertains the value to be one hundred dollars, and that the judgment was a good bar.

FROM JEFFERSON.

In the Circuit Court, J. P. SWANN, J., presiding.

JAMES R. COCKE, with whom was J. A. DEWEY, for plaintiff, cited Cooke R., 191, 193; M. and Y., 240; 4 Yer., 572; Car. Hist. L. S., §§ 753-755; 4 Phil. Ev., Cowan

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and Hill's notes, 12; 3 Dev., 360; 13 Wend., 404; Meigs' Dig., p. 636; 10 Hum., 247; 11 Hum., 189, 220, 447; 4 Sneed, 371; 4 Phil. on Ev., 183; 1 Hum., 332.

R. McFARLAND & J. M. THORNBURG, for defendants, cited *Witt v. Russy*, 10 Hum., 208, 209; *Mason v. Westmoreland*, 1 Head, 557.

DEADERICK, J., delivered the opinion of the Court.

This is an action of replevin brought by the plaintiff against the defendant in the Circuit Court of Jefferson county.

Upon the trial of the cause it appeared that one Hinkle had purchased a mare of the plaintiff. The defendant claimed her, and proposed to Hinkle if he would allow him to take the mare to one Elder, who, he said, formerly owned her, that he would return her to him at a specified time, if Elder did not say it was his (Gaut's) mare. Upon this agreement, Hinkle delivered the mare to Gaut, who refused to return her, insisting that she was his property.

Thereupon Hinkle instituted an action of replevin before A. K. Meek, a Justice of the Peace for Jefferson county, against Gaut, which was tried by Meek and two other Justices of said county, and they gave judgment against Hinkle for the mare. No appeal was taken from said judgment. Plaintiff was present prosecuting the suit for Hinkle. After the judgment was rendered, Hinkle, who had obtained the mare upon his writ of replevin, re-delivered her to Gaut in conformity to the judgment of the Justices—recanted his trade with

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plaintiff, and received back from him the amount he had paid him for the mare.

Plaintiff then instituted this suit against the defendant, Gaut, to recover the mare, and she was taken out of the possession of the defendant and delivered to the plaintiff, by the sheriff. Upon the trial, the defendant offered in evidence the record of the former trial between Hinkle, the vendee of plaintiff, and the defendant. The plaintiff objected to this evidence, but his objection was overruled by the Court, and it was allowed to be read to the jury. Verdict and judgment were rendered for defendant, and the Court refused a new trial; the plaintiff appealed in error to this Court.

The plaintiff's counsel now insist in argument, that the admission by the Court below, of the proceedings before the Justices, in the trial between Hinkle and Gaut, was erroneous, because a Justice's court is a court of special or limited jurisdiction, and that it must appear, affirmatively from the record or otherwise, that the Justice had jurisdiction of the subject matter of the suit; and if it appeared from the *evidence* that the property was worth more than \$100, then the judgment would be void, as, at the time of bringing this suit, a Justice's jurisdiction in replevin cases was limited to \$100. If it appears from the record of the proceedings, or upon the face of the judgment, that the court or Justice rendering it had no jurisdiction of the person or the subject, such judgment would be void, and, of course, inadmissible as evidence. But the presumptions in favor of the validity of a judgment when introduced collaterally, as evidence, are much stronger than those that arise in its favor

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when it is brought by appeal or otherwise, for revision, from a lower to a higher tribunal.

In this case, we are of opinion that it sufficiently appears that the Justices had jurisdiction in the case of Hinkle against Gaut; and being a judgment upon the merits, it is conclusive upon them and their privies.

The affidavit, bond and writ in this case, before the Justices, are all in substantial compliance with the Code. The plaintiff is not required to state the value of the property in his affidavit, nor is the Clerk required to state it in his writ; but the Clerk is required to take a bond from plaintiff, in double the value of the property. Code, 3376, 3379; and it is made the duty of the Clerk to value the property; and these are all the provisions of the Code in regard to the mode of ascertaining the value of the property proposed to be replevied. In the case before the Justice, he has taken a bond of plaintiff in the sum of two hundred dollars, in conformity to the provisions of the Code, 3377, requiring the Clerk to take a bond in double the value of the property, which sufficiently ascertains the value of the property to be \$100, and shows that the Justice had jurisdiction. The Justice is his own clerk, and the method pursued in obtaining the writ from him is the same as where the suit is prosecuted in court.

Let the judgement of the Circuit Court be affirmed.

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JAMES SWAGGERTY v. JOHN D. SMITH, Ex'r, &c.

1. SATISFACTION OF JUDGMENT. *Scire facias to vacate.* To maintain, under section 2990, of the Code, a *scire facias* to set aside satisfaction of a judgment by sale of property, it is necessary to allege and show a previous adjudication of the plaintiff's want of title, under his purchase. The failure of title cannot be enquired of in the proceedings by *sci. fa.* Case Cited. *Eddie v. Cowan*, 1 Sneed, 290. Code construed, 2990.

FROM COCKE.

In the Circuit Court, J. P. SWANN, J., presiding.

BARTON & MCFARLAND, for plaintiff in error.

THORNBURG & MCFARLAND, for defendant.

DEADERICK, J., delivered the opinion of the Court.

The plaintiff recovered against the defendant, as executor of John Maloy, and one Wm. R. Neilson, his principal, a judgment in the Circuit Court of Cocke county, upon which an execution was issued to the Sheriff of Greene county, and by him levied upon a tract of land in said county, as the property of the defendant, Wm. R. Neilson. The land was duly sold, and purchased by the plaintiff's agent for \$50. Afterwards, and within twenty days of the day of sale, the plaintiff advanced his bid, in legal form, to \$1,000, which was a satisfaction of part only of his judgment. Plaintiff credited upon said judgment the amount of his raised bid.

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The judgment was obtained, 1st of August, 1860; the land was sold in July, 1865.

On the 26th of February, 1868, the plaintiff caused a *scire facias* to issue, to vacate satisfaction of the judgment, the service of which was acknowledged by defendant, John D. Smith, the executor of Maloy, on the 7th of March, 1868.

A counterpart *scire facias* was issued to Greene county, and was made known to Wm. R. Neilson, the other defendant, March 11, 1868, by the Sheriff of said county.

Upon return of the writs, the defendant, Smith, demurred upon two grounds: -

1. Because the *scire facias* does not allege that the land sold and bought by the plaintiff in part satisfaction of his judgment, has been recovered from him by the defendant in the execution, or by any third party.

2. Because it is not alleged that the land so sold and bought belonged to the defendant, Smith.

The demurrer was sustained by the Circuit Judge.

The *scire facias* recites the recovery of the judgment, the sale and purchase of the land, and the crediting of plaintiff's judgment, and proceeds in these words: "And whereas, it is alleged by the plaintiff that the lands so levied upon and purchased were and are held by prior and superior levies and liens of attachment and executions at the suit of Wm. C. Scruggs; and that he, plaintiff, takes nothing by his said purchases," &c.

It is insisted by plaintiff that these facts entitle him to have the part satisfaction of his judgment set aside, and to

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have the same revived for the whole amount under the provisions of the Code, 2990; and that there was error in the Court below in sustaining the demurrer to the *scire facias*.

The Code, 2990, provides, that "in all cases where execution from a court of record or Justice of the Peace, is returned satisfied in whole or in part, by the sale of property, real or personal, taken as the property of the defendant, and afterwards, the property, or its value, or any part of it, is *recovered by some third person, by suit against the plaintiff*, or the officer making the levy or sale, the plaintiff may have the satisfaction set aside, and the judgment or decree revived *scire facias*."

The case of *Edde v. Cowan*, 1 Sneed, 290, is cited by plaintiff's counsel as sustaining this proceeding.

That case was governed by the provisions of the Act passed February 3d, 1848, which is identical with the Code, 2990, except that the Act of 1848 used the term "property," without qualification or words of limitation, and the Code uses the language "property, real or personal."

The question made in the case referred to, in 1 Sneed, 295, was that the Act of 1847-8, did not authorize the setting aside of a sale of real estate, but applied only to personal property; and the Court held that the Act included both real and personal property, and say: "We have no doubt it was the intention of the Legislature to allow the satisfaction of the judgment to be set aside, and the judgment revised whenever it turned out that the creditor got nothing by the sale on account of the *failure of title* of the debtor to the property sold, whether real or personal. The facts

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in the case of *Edde v. Cowan*, were, that Cowan obtained judgment against Edde, and sold his land for its satisfaction. He brought an action of ejectment against the tenant in possession, and failed to recover, because the title was not in Edde at the time of the sale.

While the suit was not in that case, technically against the plaintiff, yet it was held, properly we think, that in the action of ejectment in which the right or title to the land is tried, a third person may be said to have recovered the land against the plaintiff, after the same had been sold for the satisfaction of plaintiff's judgment.

But in this case, no one has instituted suit against the plaintiff, since he obtained his judgment, nor has he tested the validity of his title to the land, by bringing suit for it, so that the land has not been recovered from him since his purchase; and the Code, 2990, gives the remedy sought to be used in this case, only where the property sold, or its value, is recovered by some third person, by suit brought against the plaintiff, after the satisfaction in whole or in part of his execution.

We do not think such remedy can be used, unless it has been ascertained in another proceeding instituted by or against the plaintiff, by a competent tribunal, that the creditor got nothing by the sale, on account of the failure of the title of the debtor to the property sold. We can not undertake in this case, to determine whether there are prior liens or attachments or executions subsisting upon said lands, which would defeat the plaintiff's title acquired by his purchase. The failure of the title acquired by purchase, by the plaintiff, it is manifest

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from the statute, should be judicially ascertained in a suit brought for that purpose, before he is entitled under the *scire facias* to have the satisfaction of the judgment set aside, and to have the same revived.

The plaintiff is not left without his remedy, but in the construction of a statute, in which the language employed is not so ambiguous as to render its meaning doubtful, we do not feel authorized to allow arguments from convenience, to influence our judgment.

For the reasons above stated, we are of opinion that the judgment of his Honor, the Circuit Judge, was correct in sustaining the demurrer, and the same is affirmed.

JOSEPH R. ANDERSON v. JOHN TALBOT.

1. EXECUTION SALE. *On judgment of a J. P. Return of papers to Court.*

It is not, perhaps, essential to the validity of a condemnation and sale of land on a justice's judgment, that the papers should be returned and the condemnation had at the next term of the Circuit Court after the levy. Code, 3080. But unless they are returned within a reasonable time, the lien is lost; and a *bona fide* purchaser from the debtor, by sale made and deed registered after levy and before the condemnation, will acquire a good title as against the purchaser at execution sale.

2. SAME. *Same. Case in judgment.* A levy made on the 11th January, 1862; sale by debtor to complainant, 27th October, 1862; papers of J. P. returned to March Term, 1866, the war intervening; Sheriff's sale 14th July, 1866; held *prima facie* invalid, on demurrer.

3. JUDICIAL KNOWLEDGE. *Terms of Court.* This Court can not judicially know whether a particular term of a Court was held or not, but it will

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judicially take notice that Courts were re-established after the war, prior to July, 1865.

4. LIEN. Secret liens are not favored in law, as against innocent purchasers and creditors.
5. CLOUD UPON TITLE. *Sheriff deed.* A party in possession of land has a right to remove as a cloud, a claim under execution sale, without averring that the Sheriff has made a deed, which, it seems, may be presumed.
6. LEVY ON LAND OF SURETY. *Without return of no property as to principal.* A levy on the land of a surety, is not void because the return does not show that there was no property, real or personal, of the principal, to be found. The Code, 3028, 3029, is directory. If the surety submits, no other person can complain.

FROM SULLIVAN.

In the Chancery Court at Blountville. Decree allowing demurrer and dismissing the bill, O. P. TEMPLE, Ch., presiding.

F. W. EARNEST, for complainant.

R. M. BARTON, for defendant. As to requisites of levy, he cited *Grissom v. Moore*, 1 Sneed, 361; Lien of levy, *Parker v. Swan*, 1 Hum., 80; *Farquhar v. Toney*, 5 Hum., 502.

FREEMAN, J., delivered the opinion of the Court.

This is a bill filed in the Chancery Court at Blountville, to remove a cloud on the title to about 113 acres of land. The bill was demurred to, demurrer sustained by the Chancellor, and the bill dismissed; from which decree complainant prosecutes a writ of error to this Court.

The facts stated in the bill, material to be noticed, are, that Talbot obtained three judgments before a Jus-

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tice of the Peace, for Sullivan County, in August, 1860, against one Rutledge, as principal, and James D. Rhea, as security; each for the sum of \$345.78 and costs; that on the 11th day of January, 1862, executions on these judgments were levied on 113 acres of land, of the said security, Rhea. The papers in the cases, were sent up to the Circuit Court of Sullivan County, by the justice, for condemnation of the land, at the March Term, 1866, when an order of condemnation was entered and a *venditioni exponas* issued, under which the land was sold on the 14th of July, 1866, and purchased by Talbot, he bidding the amount of his debt and costs.

On the 27th of October, 1862, complainant, Anderson, purchased 300 acres of land from the said surety, Rhea, including the 113 acres levied on, and on the 4th of December, 1862, his deed for the same was registered and he went into possession of the land under his purchase, and has remained in possession up to the filing of this bill.

Complainant alleges that he supposes said Talbot holds the Sheriff's deed for said tract of land; and he fears his possession will be disturbed by him. He prays that the cloud be removed from his title, and that he be quieted in his possession, with a prayer for such other and different relief as he may be entitled to.

The first question presented for our consideration is, does the bill allege such a case as will authorize a court of equity to interpose to remove the cloud on the title of complainant's land. While the allegations of the bill on this question are not very specific or strong, yet upon the whole facts as stated, we think, admitting them to be

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true, as the demurrer does, the complainant has made out a case entitling him to relief.

It is held, in this State, that a bill will lie to remove a cloud upon a title, and declare a deed which constitutes that cloud void, and have the same cancelled, whether its character as such, appear from the face of the instrument or not. *Jones v. Perry*, 10 Yerg., 83; 3 Head., 40; 1 *J. C. R.*, 522.

A bill to remove a *cloud*, is a head of equity by itself. It will lie, although the defendants are in possession, and complainants have the legal title, and might sue at law for recovery of the property, that not being esteemed adequate relief. 3 Head., 42; 2 Yerg., 524; 10 Yerg., 59, 83.

The principle here stated is, that the relief granted is not dependent upon the fact that the party seeking it has the legal title, and may successfully maintain or assert it in a court of law. The principle on which this head of equity rests, is that of *quia timet*, and is thus stated by Mr. Willard, in his work on Equity Jurisprudence: "Where a person is apprehensive of being subjected to future inconvenience, probable or even possible to happen, by neglect, inadvertence or culpability of another; in such case, the Court will grant the party relief; quieting his apprehension of future inconvenience, by removing causes which may lead to it." Will. Eq. Jur., 303.

A sound application of the above principles, we hold, will entitle the complainant, under the facts of this case, to maintain his bill to remove the cloud from his title, provided the title shown to be in, or claim of, defend-

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ant be an invalid title, or an unsupported claim of right, in the view of a court of equity. Is the levy and sale under which defendant claims in this case a valid title, or does it give him any right or claim to the land in controversy?

We have given a careful examination to the question, so far as we could do so from the authorities furnished us, and such other authorities as we could obtain, and we hold that the levy of complainant was abandoned, and ceased to be operative as a lien on the land in controversy, by reason of the *laches* of the defendant in asserting his rights under the same, which, if not asserted at the time prescribed by Code, 3080, at the next term of court after return of execution levied, at any rate ought to be done within a reasonable time thereafter.

It is the policy of our law to discourage secret liens, as against innocent purchasers and creditors; and when such liens are given, as in the case of levy of execution, from a Justice of the Peace, the party should not be permitted to rest upon his legal right, keep the fact of the lien secret for an indefinite time, and then come forward and assert it, as against the rights of parties who have innocently paid their money for the property.

In the case of execution on personalty the rule is settled, that "if the goods are permitted to remain in the debtor's possession for an unreasonable length of time, or if the creditor, desiring to favor the debtor, instruct the officer to delay and not to proceed with the execution, the goods remaining in the debtor's possession and use, the execution would be deemed fraudu-

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lent as to creditors and purchasers. *Etheridge et als v. Edwards*, 1 Swan, 429; *Roberts v. Scales et als*, 1 Ire. L. R., 90.

We will not undertake to define what is an unreasonable time to delay sale under execution; but in view of the requirements of the law, that in case of levy on real estate, by execution based on Justice's judgment, the Justice shall return the papers to the *next* term of the Circuit Court, which Court is to condemn the land and make an order of sale at said term, which the sheriff would be required to execute and return by the next succeeding term; we think that delay from January, 1862, to March Term, 1866, is an unreasonable time for the creditor to sleep upon his rights under his levy.

It has been insisted that the war intervened, and Courts were closed. We can not judicially say when the Courts in Sullivan county were closed, as Courts were held open in some portions of the State much longer than in others, and were never closed by any authority. This is a fact, which, however, may have a very material influence on the result in this case, on the hearing on the proof after answer. We can at present, however, only decide on the the facts presented on the face of the bill.

We can, however, judicially know when our Courts were reopened, as it is a part of the history, and one of the acts of, our State government. We know that the first Circuit Court was held in July, 1865, again in November, and that March Term, 1866, was the third regular term of the Court after the war.

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This delay of defendant after the opening of the courts of the country, forms a material consideration for the conclusion we have reached in this case.

So far as it appears to us, there may have been several terms of the Circuit Court of Sullivan county in 1862, after the levy of the executions in this case. The defendant ought to have made some effort to continue and effectuate his lien, if such courts were held. He might have had the papers returned to court, where the case would have been docketed,, and being in the nature of a proceeding *in rem* against the specified property described in the levy, it would have had the effect of a *lis pendens* in a court of record, and have been notice of his lien to all who might purchase the land. We hold, therefore, that the delay and laches shown by the facts in this case, unexplained, except by the fact of the existence of the war, is, as against an innocent purchaser, for valuable consideration, evidence of abandonment of lien, if not of fraud, and that a title obtained by sale of the land under such levy, in the hands of the plaintiff in the execution, can not be allowed to prevail in a court of equity.

It has been insisted by counsel that this is not a case for the action of a court of equity in removing a cloud from the title of complainant, because he is in possession of the land, and time will strengthen, not weaken, his title. We, however, think that a levy on land of a party, a sale, after condemnation by a circuit court, under order of said court, and purchase by the plaintiff in the execution, and sheriff's deed for the same, as we are bound to presume the sheriff has done

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his duty in the case as the law directs, is such an apparent title or claim to the land, as furnish a ground for an appeal to a court of equity to remove the cloud thus impending over the title of an innocent purchaser, and that he has the right to ask that this apparent title be declared void.

Such a claim is one that would seriously affect the value of the land in the market, would hinder its sale, if not entirely prevent its being sold for its full value, as no one would desire to purchase a law suit; and the party holding land under such circumstances, might well have reasonable grounds for apprehension of future inconvenience and injury, and ask the court to quiet, and clear up, what the court sees to be, a good and valid title.

As to the question made in the bill, that the levy is void, because not showing that there was "no property, real or personal, of the principal, to be found, on which to levy," before levying on property of surety, we think, there is nothing in this of which complainant can take advantage.

The statute is directory to the sheriff, and is for protection of the surety. If he submits to it, no one else can be heard to complain.

Upon the whole, we conclude the demurrer was improperly allowed; and we reverse the decree of the Chancellor, and remand the cause to be further proceeded in.

J. H. & W. A. Susong v. William Jack.

J. H. & W. A. SUSONG v. WILLIAM JACK.

1. ARBITRATION. *Reference of Cause to. Discontinuance.* A reference to arbitrators, without a stipulation that the award is to be made the judgment of the Court, is a discontinuance of the suit.†
2. SAME. *Same. Same.* That it should have this effect, it is not necessary that it be a valid submission, nor that there should be a valid award, but the voluntary act of submitting the cause to another tribunal, is sufficient.
Case overruled, *Norwood v. Stephens*, 7 Cold., 1.
3. PLEADING. *Puis darrein continuance.* A plea *puis darrein continuance* is not since the Code, a waiver of former pleas. Code 2892.
4. SAME. *Same. Costs.* Costs are to be adjudged not in view of the new plea, but of all the issues.

FROM COCKE.

In the Circuit Court, J. P. SWANN, J., presiding.

R. M. BARTON, for plaintiff in error.

J. M. THORNBURG & B. MCFARLAND, for defendants.

DEADERICK, J., delivered the opinion of the Court.

The question raised in the record in this cause, is, whether the submission of the matters in controversy between parties, in a cause pending in court, to arbitration, without providing that the award shall be made the judgment of the court, operates a discontinuance of the cause. Such was the charge of his Honor, the Circuit Judge, before whom the cause was tried; and upon that charge the jury found in favor of the defendant, and the plaintiffs bring the cause here by appeal, in the nature

† This case was cited and approved in, *Hinson v. Coz*, Ms., Nashv., Dec. 12, Freeman, J.

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of a writ of error, for the purpose of reversing the judgment of the court below.

Numerous authorities have been cited to sustain the charge of the Circuit Judge, and we have examined other authorities besides those cited, and so far as we have had access to the decisions of our own and other courts, with the single exception of the case referred to by the counsel for plaintiffs, they are uniform in holding that the *submission* to arbitration, is the act of the parties which ousts the court in which the cause may be pending, of its jurisdiction, and works a discontinuance.

In none of them is it held, that it is necessary to this end, that the arbitrators should take any steps in the case, except in the case referred to by plaintiffs counsel, of *Norwood v. Stevens*, decided at the last term of this Court; and that opinion was dissented from by one of the three Judges then presiding.

Upon a careful examination of the two conflicting opinions, we are satisfied that the weight of authority and reason, is in favor of the dissenting opinion. See 10 Yerg., 439; 2 Hum., 516; 6 Hum., 29; 9 Hum., 142; 1 Cold., 256; 2 Wend., 505. In the case in 9 Hum., the Court say: "The legal consequence of discontinuance does not at all depend upon the validity of the submission, as between the parties to the suit, nor upon the validity of the award, but upon the simple fact that the parties by their own voluntary act, have withdrawn the cause from the jurisdiction of the Court in which it was pending, and submitted it to another tribunal of their own selection.

The other cases referred to fully sustain the proposition, that it is the voluntary act of the parties in *sub-*

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mitting their cause to another tribunal, that operates to discontinue it.

The counsel for plaintiffs also insists that the plea *puis darrein continuance*, is a waiver of all former pleas, and that the defendant should have been held liable for all costs accrued up to the time of the filing of his last plea.

Such would have been the effect at common law, but by the provisions of the Code, 2892, "Either party may, on good cause shown, and by leave of the Court, make a supplemental pleading, alleging any material facts which have happened, or have come to his knowledge since the filing of his former pleadings, nor shall such new pleading on the part of the defendant be considered a waiver of former defenses."

We are therefore of opinion, that there is no error in the judgment of the Court below, and affirm it.

LEWIS C. STANLEY, v. ISHAM SHARP.

COUNTY COURT. *Order as to Road.* In an action *qui. tam.* for altering a public road, the validity of an order of the County Court, authorizing the change, cannot be attacked by evidence, *aliunde* showing that it was not made upon a return of a jury of view. Code, 1237.†

FROM SCOTT.

In the Circuit Court, L. C. HOUK, presiding.

H .R. GIBSON, for plaintiff.

† Is not the action of the County Court in Road cases in the nature of legislation as to "local affairs," Const., Art. 11, s. 9, so far as the public is concerned, and judicial only when necessary to take private property, so that a jury would only in the latter case be required?—REP.

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L. C. HOUK, for defendant.

SNEED, J., delivered the opinion of the Court.

This was a *qui tam* action, brought by plaintiff against defendant, before a Justice of the Peace of Scott county, by a warrant issued on the 13th day of October, 1868. There was judgment for the defendant, before the Justice; and upon appeal to the Circuit Court, judgment was also for defendant, from which the plaintiff appealed. The action is founded upon the Code, 1237, which is in the words following: "No person shall turn, alter, or change a public road, unless by the order of the County Court, founded on the report of a jury, appointed and sworn, as in cases of locating new roads, under the penalty of five dollars, for each month such road remains turned out of its old course, to be recovered on summons before any magistrate, at the suit of any person who may sue for the same.

It appears that the defendant applied to the County Court for authority to change the road, and that he afterward turned the road so as to run around his field, and obstructed the old road by erecting fences and felling timber across it. But it seems from the testimony of Granville Duncan, who was overseer of the road, that defendant did not obstruct the old road until the County Court authorized him to do so, and until the court had accepted the new road made by defendant in lieu thereof. It is shown by parol that the County Court did not base its action on the report of a jury of view, but that it was announced by the Court to the defendant,

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that if he would bring up any five men who would swear that said change was not prejudicial to the public, the same would be accepted. The defendant accordingly brought into Court the five men required, whose testimony being satisfactory, the Court thereupon accepted and ratified the change. It is shown, from the minutes of the Court, that, at the October Term, 1867, it was ordered by the Court that Isham Sharp have permission to change a second-class road, on his land, leading up Buffalo Creek;" that at the January, Term, 1868, it was ordered, "that Isham Sharp have the new road, as changed by him, completed against the first Monday in February next, and that the old road be left open until the new road is completed;" that at July Term, 1868, it was ordered, "that the new road, as made by Isham Sharp around his farm, be established as the public highway, and the old road disannulled. The defendant, it seems, had authority, or thought he had authority, for his action in the premises, though it is shown that the change was not agreeable to the overseer and hands upon said road. The Court is of opinion that this is not such a proceeding as requires that all the facts necessary to give the Court jurisdiction should be recited in the judgment, and the judgment being valid in its face, can not be attacked in this collateral proceeding and shown to be void by parol evidence. Any person feeling himself aggrieved by this judgment of the County Court, had his right of appeal, to have its errors reviewed and corrected. But it is clear that a judgment not void in its face can not be attacked in any collateral proceeding, and shown by parol to be a nullity. *Hall v. Heffly*, 6 Hum., 444;

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Thacker v. Chambers, 5 Hum., 313; *Britain v. Cowan*, 5 Hum., 319; *Witt v. Russey*, 10 Hum., 208, *et vide Mankin v. The State*, 2 Swan, 206.

The judgment is affirmed.

JOHN C. BURTS v. ROBERT EVANS.

1. **CONDITIONAL SALE.** *Mortgage.* A writing, reciting a purchase of a negro, for "which I have agreed to pay \$1,200," as shown by bill of sale, and stipulating for a conveyance to a wife and child of the vendor, when the sum of \$575 should be paid to the vendee, he having paid so much of the \$1,200, held not to be a mortgage, but a sale.
2. **PLEADING.** *Declaration. Variance.* A declaration in assumpsit on this writing, alleged that the defendant undertook, &c., that he would pay the plaintiff \$1,200, evidenced by writing, and made profert; onoyer and demurrer, there was held to be no variance.

FROM JEFFERSON.

In the Circuit Court, WM. L. ADAMS, J., presiding.

BARTON & MCFARLAND, for plaintiff, cited *Bennet v. Holt*, 2 Yer., 6; *Scott v. Britton*, 2 Yer., 215.

J. R. COCKE, for defendant, insisted that the demurrer ought to have been sustained, and cited 1 Ch. Pl., 432, 434; and that the judgment should be rendered here on the demurrer, citing *Snodderly v. Weaver*, 1 Cold., 256.

DEADERICK, J., delivered the opinion of the Court.

The plaintiff, John C. Burts, brought an action of

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assumpsit against the defendant, in the Circuit Court of Jefferson county, upon the following instrument:

"I have this day bought a negro man, named Henderson, from John C. Burts, for which I have agreed to pay twelve hundred dollars, as the bill of sale will more fully show; and I hereby agree and bind myself, when the sum of five hundred and seventy-five dollars shall be paid to me, which I have this day paid upon the price of said negro, to make a bill of sale of said negro to Mary L. Burts, and her infant child, Mary M. Burts, which is by and with the consent of the said John C. Burts, for their sole use and benefit, separate and apart from the said John C. Burts, which is hereby attested by his proper sign manual—that is to say, if the five hundred and seventy-five dollars shall be paid to me on, or before the first day of January, 1862.

"June 30th, 1860. Signed, ROBERT EVANS,

"Attest: WM. N. CLARKSON. JOHN C. BURTS."

The plaintiff makes profert of the foregoing written instrument, in his declaration.

The defendant craved oyer of the "writing sued on," and setting it out in full, demurred to the declaration, because of the alleged variance between the "writing" sued on as described in the declaration, and as it appears as set out in full in his demurrer. The variance is alleged, in the demurrer, to consist in this: That the declaration states that defendant undertook and promised to pay to the plaintiff \$1,200, &c.; whereas, "he, as shown by said writing, only promised and agreed to make a bill of sale for the slave mentioned, to the parties named, upon the payment to him of \$575, on or

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before the first day of January, 1862." This demurrer was overruled, and defendant pleaded non-assumpsit and payment. Upon the trial, the jury rendered a verdict in favor of the defendant, and the plaintiff appeals in error to this Court.

There was no evidence offered in the Court below, upon the trial, except the writing sued on, and the bill of sale, of the same date, from plaintiff to defendant, for the negro. It recites that plaintiff sells to defendant the negro, Henderson, for \$1,200, part of which is to be paid by Evans to third persons, to whom Burts is indebted, and the balance of the \$1,200 is to be paid, one-half the first day of January, 1861, and the other half the first day of January, 1862.

The Court charged the jury, that "the obligation or contract sued on in this cause, was a mortgage, and that plaintiff was not entitled to recover anything upon it whatever. This charge, we think, is erroneous, in several respects. If the contract sued on was a mortgage the demurrer of defendants should have been sustained. But we are of opinion that the action of the Circuit Judge in overruling the demurrer was correct.

The plaintiff, in making profert of the instrument sued on, need not, in his declaration, allege or show more of it than is sufficient to show his right of action; and if, upon oyer craved, the writing sued on shows that the plaintiff has no cause of action, then defendant may demur, and defeat the action.

The contract, or writing sued on, in this case, shows that defendant bought of plaintiff a negro slave, at the price of \$1,200, and had paid \$575 of the price, and

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refers to the bill of sale for terms of sale. In the same instrument, Evans agrees, if the \$575 are paid to him on or before the first day of January, 1862, he will make a bill of sale to said negro, to Mary L. Burts and her child, Mary. The bill of sale is in the usual form, specifying the time and manner of the payment of the purchase money (\$1,200) for the negro.

The question upon which the rights of the parties turn, is, whether the writing sued on and the bill of sale, make this transaction a mortgage or a sale, with liberty to re-purchase. A mortgage is the conveyance of an estate or property, for the security of a debt, to become void on payment of it. 4 Kent, 136. By the common law, all estates, which were defeasible by the payment of money by the vendor, became absolute, if the money was not paid at the stipulated time, because the estate was considered as the thing contracted for, and the money as collateral thereto. This rigorous doctrine was so far modified, that, in cases where a pre-existing debt or a loan, made at the time of purchase, was the consideration of the conveyance, the debt was regarded as the thing contracted for, and the conveyance as collateral thereto; and, in these last named cases, the debtor, or the vendor, had the right to redeem, although the day of payment had elapsed. 9 Yer., 172.

If the price of the property be settled and agreed upon, and if the vendor be not bound to repay the price received by him, and if possession is delivered, the property and the title thereto passes to the vendee; and if he agree to re-convey, upon the payment to him, by the vendor, on a day certain, a given price, the transaction

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is a sale, with liberty to re-purchase, and not a mortgage. Such an agreement, however, entered into by the vendee, does not impose any obligation upon the vendor to pay the stipulated price, but merely secures to him the privilege, by making the payment at the day specified, to re-purchase the property sold.

Suppose the slave had died, the loss would have fallen on the vendee. He had received him, and bound himself to pay \$1,200 for him, and held no obligation on the vendor to pay him anything, in any contingency; but had further obliged himself to convey the slave to Burts' wife and daughter, if the money he had paid was re-paid to him on a certain day. Burts owed Evans nothing, borrowed no money from him, and had not bound himself to re-pay the amount received towards the slave. He had the election to do so or not, but Evans was bound to receive it, if tendered at the time specified. We, therefore, hold, that the transaction, as disclosed in this record, was a sale, with liberty to re-purchase, and not a mortgage.

Let the judgment be reversed, and the cause remanded for a new trial.

NOTE.—The form of the demurrer in this case precludes the objection that the terms of the contract to pay are only partially set out in the paper sued on, the payment by instalments and the time of payment being shown only by the bill of sale.—REP.

A. Fowler v. L. D. Alexander.

A. FOWLER v. L. D. ALEXANDER.

1. PLEADING. All demurrers must be special. Code, 2924.
2. SURETYSHIP. *Proved at law.* In a case between a surety and the holder of a note, the fact of suretyship may be proved at law by parol.
3. SAME. *Defense at law.* A party appearing on the face of a note as joint maker, may plead in his discharge, suretyship, notice to the holder to sue, and failure for thirty days. Code, 1968.
Case cited, *England v. McKamey*, 3 Sneed, 76.

FROM MONROE.

In the Circuit Court, E. T. HALL, J., presiding.

W. J. HICKS, for plaintiff in error, insisted that the Court below erred in sustaining the demurrer to defendant's plea; that the fact of suretyship may be shown by parol, and cited 2 Am. Lead. Cases, 4 ed., 403, 404. *England v. McKamey*, 4 Sneed, 76.

A. CALDWELL, for defendant.

FREEMAN, J., delivered the opinion of the Court.

This is an action of debt, commenced in the Circuit Court of Monroe County, by defendant in error, against plaintiff in error, on the following instrument:

"One day after date, we, or either of us, promise to pay L. D. Alexander, eight hundred and fifty-three dol-

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lars and eighty cents, for value received. Witness our hands and seals, this, the 28th day of January, 1860.

“FREDERICK DEAN, [SEAL.]

“ABIJAH FOWLER, [SEAL.]”

Fowler only was sued, and pleaded the general issue; and a second plea, in which he alleged, in substance, that he executed the instrument sued on, as surety of Frederick Dean, for a tract of land sold by plaintiff, to said Dean; and that after said note became due, and more than thirty days before the commencement of plaintiff's suit, he gave notice in writing to the plaintiff, requiring him to put said note in suit; and avers that he failed, and refused to commence an action on said note in thirty days after the service of said notice; and to proceed therein with due diligence in ordinary course of law, to collect said note off said Dean. “And so he says he is discharged from liability on the same.” To this plea there was a demurrer, which was sustained by the Court. A trial was had on the general issue made by first plea, judgment rendered for plaintiff, motion for a new trial made and overruled, and an appeal in the nature of a writ of error to this Court.

The demurrer in this case, was improperly sustained. First, because it is a general demurrer, and not special as required by Code, 2934. Second, because the matter of the plea, if true, is a good defense to the action.

It is insisted that the fact of suretyship should appear on the face of the note, in order to entitle the surety to be discharged under the provisions of the Code,

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1968. We hold that the *fact* that he is the surety, and not the form in which the fact is made to appear, is the ground on which the party is entitled to be discharged, by complying with the requirements of the statute. This view of the question is sustained by the case of *England v. McKamey*, 4 Sneed, 76. Though the direct question is not made in that case, yet the facts of the case are very similar to this. The principle is now well settled, that the fact of suretyship, may be shown by parol proof, in a Court of law, upon a question between the surety and the holder of a note. As to the discharge of a surety by *laches* of the holder, see authorities collected in 2 Am. Lead. Cas., 403, 404.

For the error in the action of the Court, sustaining the demurrer to the second plea of defendant, the case must be reversed, and remanded for a new trial.

ALEXANDER STUART, Plaintiff in error, v. SAM'L S. McCuiston.

1. JUDGMENT FOR COSTS. *By motion. Requisites of.* A judgment, by motion, for costs under the Code, 3204, must have all the requisites of other judgments by motion. It must show, by sufficient description, the cause in which the costs accrued, and the issue of execution, a sufficient return of the execution showing search, and want of property, the production of the execution, on the trial of the motion, and the right of the applicant to judgment.†

† See *Rucker v. Moore*, post —.

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2. SAME. *Same. Parties.* The Clerk of a Court can only recover his own costs, not those due to others.
3. SAME. *Same. Not aided by bill of exceptions.* A defective judgment by motion, without notice, can not be aided by facts appearing in the bill of exceptions.
4. SAME. *Same. Remanding to amend.* Where there is a motion without notice, this Court will not correct the judgment, or remand the cause for an amendment equivalent to a new suit.

FROM JEFFERSON.

In the Circuit Court, JAMES H. RANDOLPH, J., presiding.

R. M. BARTON & W. MCFARLAND, for plaintiff in error.

R. MCFARLAND & J. M. THORNBURG, for defendant.

NELSON, J., delivered the opinion of the Court.

It has been, repeatedly and through a long series of years, announced by this Court, that the statutes which authorize judgments by motion, are in derogation of the common law, and should be construed strictly, and that all the facts necessary to give the Court jurisdiction, should be set forth in the judgment. In this case, it is alleged that the judgment, by motion, was rendered against the plaintiff in error, who, it is said, was the successful party in a suit in the Circuit Court of Jefferson county, for costs which could not be collected out of the defendant.

The defendant in error was Clerk of said Court, and

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it is argued that he was entitled to his judgment, by motion, under the Code, 3204, which provides that, "all costs accrued at the instance of the successful party, which cannot be collected out of the other party, may be recovered, on motion, by the persons entitled to them against the successful party." The case is entitled, "*Alexander Stuart v. James C. Bradford*," and it is stated in the judgment that, in this cause, Samuel S. McCuistion, Clerk of this court, produced in open court the following items of costs; and various items are then set out, including State tax, Clerk's, Sheriff's, Justice's and witness' fees—amounting, in the aggregate, to the sum of \$42.20. The judgment, on motion, then proceeds as follows: "*Fi. fa.* returned; nothing made, as defendant is a volunteer. August 5, 1861. N. B. Swan, Dep'ty Sheriff;" and moved the Court for judgment against the said Alexander Stuart, the successful party, alleging that execution had been issued against the defendant, J. C. Bradford, and that nothing could be made, and that Bradford had left the State, and had left no property, real or personal, within the jurisdiction of this Court; and that the said Bradford is wholly insolvent. And it appearing to the Court that the allegations of the Clerk are all true, it is therefore considered by the Court, that the said Samuel S. McCuistion recover of the said Alexander Stuart the sum of forty-two dollars and twenty-two cents, together with the costs of this motion," &c., &c.

We hold this judgment to be utterly null and void, for various reasons:

1. It does not show how, or in what court the case of Alexander Stuart against James C. Bradford was pend-

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ing, when it was determined, or in whose favor, except by implication, or when or by whom the execution was issued.

2. It does not show that the execution was produced in court, but simply states that the plaintiff, in the motion, produced the "following items of costs."

3. It does not recite a sufficient return, or show that search was made and no property found, so as to make the fact clearly appear that the costs could not be collected out of the other party.

4. The statute does not give the remedy to the Clerk for all the costs, but gives it to the *persons* entitled to them; and the Clerk had no authority to enter a motion or obtain a judgment, for anything more than his own cost, even if the case had been properly described.

It is true that the bill of exceptions filed in behalf of the plaintiff in error, purports to exhibit the execution; and a paper purporting to be an execution is copied into the record; but it is not so identified as to become part thereof; and even if it were, the defective judgment can not be aided by the evidence in the bill of exceptions; nor can we, in a case like this, where no security for the costs of the suit was given, as contemplated by the Code, 3189, and where the motion is so defectively entered, either correct the judgment or remand the cause for amendment. If the appearance of the plaintiff in error, by counsel, in the court below and in this court, can, in a summary proceeding, amount to a waiver of notice, it would create no obligation to appear again in the court below, and waive notice of a new motion, or of such an amendment of the present

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motion as would be equivalent to the commencement of a new suit.

Let the judgment be reversed, and the motion dismissed.

T. H. BUTCHER, in error, v. J. G. PALMER *et als.*

1. FORCIBLE ENTRY AND DETAINER. *Description of premises.* In a warrant for forcible entry and detainer, of a school-house, a description as a school-house in the 10th civil district of Union county, known as Miller's School-House, is sufficiently certain.
2. SAME. *Complaint.* No written complaint is required in forcible entry and detainer.

FROM UNION.

In the Circuit Court of Union county.

The transcript does not show what Judge presided on the trial of this cause.

W. R. EVANS, for plaintiff in error.

MEEK & GRATZ, for defendants.

NICHOLSON, C. J., delivered the opinion of the Court.

This is an action of forcible entry and detainer, tried first before three Justices of the Peace in Union county, and afterwards, upon appeal, in the Circuit Court of said

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county. The defendants in error were successful in the suit, both before the Justices and in the Circuit Court, and plaintiff in error brings the case here by appeal in error. The defendants in error were Common School Commissioners for the Tenth Civil District of Union County. They sued plaintiff in error for unlawfully detaining from them a school-house in said district known as Miller's School-house, and the jury rendered a verdict in their favor. After moving for a new trial, which was overruled, the defendant moved in arrest of judgment, first, because the description of the school-house was too vague and uncertain to found a judgment upon; and second, because no written complaint was filed when the warrant issued. The Circuit Judge disallowed the reasons in arrest of judgment, and we think, correctly. It is difficult to understand how there could be any uncertainty as to the property in suit. The civil district is specified; it is described as a school-house in that district, and one known as Miller's School-house. The second reason in arrest of judgment, is equally untenable. No written complaint is required by the Code to be filed.

The judgment below was correct, and we affirm it.

THOS. DRAPER *et al v.* JOHN M. STANLEY.

1. EVIDENCE. *In Ejectment. Statement of deceased witness before processioning jury.* In ejectment, it is error to admit evidence of what a deceased witness stated before a processioning jury as to the locality of a corner,

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without proving that the processioning was regularly instituted, and between the same parties, and that the statement was made under oath, or that the jury were on the premises, or at the corner in question.

The Court does not hold, that with all these requisites, the evidence would be admissible.

2. *SAME. Same. Declarations of deceased agent as to corner called for.* The admission of testimony, that a deceased person stated, as to the locality of a corner, that he, as agent of the former owner, made a deed for the land, and made it to a particular spot, as the corner, was held to be error, for want of proof of knowledge of the corner, and also because it is contradicting the deed made by the declarant, the party in interest not being shown to have been present.

FROM KNOX

Ejectment in the Circuit Court, J. P. SWANN, Ch., presiding.

GEO. ANDREWS, for plaintiff, cited Phil. on Ev., Cow. & Hill's notes, 112, 528, 534. M. L. HALL with him.

JAS. R. COCKE, for defendant, cited *McCloud v. Mynatt*, 2 Cold., 165; *Beard v. Talbot*, Cooke, 142; *Holland v. Overton*, 4 Yer., 482; Greenl. Ev., 297, 300.

TURNER, J., delivered the opinion of the Court.

The ruling of the Circuit Court in admitting the testimony of Mynatt, that Goss, who was dead, and who had been examined as a witness before a processioning jury, said to that jury that Martin's corner was on Potter's Knob, that he was not present when the corner was made, that Nelson's corner was at the pine

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in the glade on the other side of "Mitchell's Knob," and in admitting the testimony of Wm. Smith, that "Goss said he, as agent, made the deed to the top of Potter's and Mitchell's Knobs, and that Martin's corner was on Potter's Knob," is error.

An action of ejectment was commenced by the plaintiff in error, against defendant in error, in the Circuit Court of Knox county, to the June Term, 1860, for land embraced in the following boundaries: Beginning on the south bank of Bull Run, Moses Martin's corner, thence with said line to the top of the Brushy Valley Knobs to a stake; thence down said Knobs with the extreme height to a stake, Nelson's corner; thence with said line to a large water oak on the south bank of Bull Run, Nelson's corner; thence up said creek as it meanders to the beginning station. Verdict and judgment in the Circuit Court for defendant, and an appeal to this Court. The question is one of boundary, the objective points being the boundary and corner on the top of "the Brushy Valley Knobs." There is much proof in the record as to what are the Brushy Valley Knobs. Some witnesses fixing by reputation that title, as defendant insists, to the range of hills called Potter's and Mitchell's Knobs, and others, as plaintiff insists, locating them as between the last named hills and Copper Ridge, and beyond said hills, from the beginning corner of the tract embraced in the boundaries set out in the deed from Alvis by his Attorney, in fact, Goss, to Thos. Draper, of 16th June, 1829.

On the trial of the cause, the plaintiff was permitted, over the objection of the defendant, to introduce the testimony recited above.

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The testimony of Mynatt was incompetent, because he, Goss, was not an actor; he was not the surveyor who established the corners, nor was he present when they were established. He does not show that he was even at the corners, or had them pointed out to him by any person, whose declarations are competent under the law. Nor do his declarations show any knowledge from any source, of the establishment and existence of the corners, nor does he with any certainty, locate the corners from the statement as detailed. We must infer he never saw the corners; and that his declarations do not fall within the rule for proving boundary by reputation.

The processioning spoken of is not such as the law contemplates. The record shows no regular or legal steps; therefore, we are relieved from determining the admissibility of the testimony of a dead witness, the rule being, that, in order to warrant the reception of evidence of what a deceased witness swore on a former trial between the same parties, it is necessary to prove, not only the death of that witness, but also that his testimony was given in a cause legally pending between the same parties. Such evidence must be given before parole evidence of what the deceased witness swore upon a former trial, can be admitted. 1 Starkie Ev., 158. In addition to the fact that there is no pretense that the processioning was legal, it does not appear that Goss made the statement under oath.

If the processioning had been legal, and Goss examined upon his oath, we are not prepared to hold that his testimony would have been competent for either party to this action. Processioning, in our law, is derived

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from the perambulations of the common law, in which the proceedings and return of the jury or persons making them, and their acts, and those of their assistants, such as marking boundaries, setting up monuments and the like, including their declarations respecting such acts, made during the transactions, are evidence against the parties between whom the perambulation was made; but we have been unable to find where it was ever held that the acts or declarations of third persons, disconnected with the perambulation, were admitted. In the case at bar, it does not appear that the jury taking the testimony, was even upon the premises at the time of Goss' statements; much less does it appear that it and Goss were at the corners spoken of, for any purpose at all. The testimony of Smith is obnoxious to the above, and also the further objection, that it is contradictory of the deed made by Goss, as agent and attorney for Alvis to Draper, the latter not being shown to be present, and is consequently not to be affected by it under any of the circumstances in this case.

The testimony was calculated to mislead the jury in weighing the question of disputed boundary, they most likely disregarding all the other testimony, and basing their verdict upon this. The evidence of Mynatt and Smith was purely hearsay, invading the province of the jury, in deciding what are the Brushy Valley Knobs—the main point in issue.

Judgment reversed, and cause remanded.

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B. L. WARREN v. WILLIAM KENNEDY.

JUDGMENT BY DEFAULT. *In trespass admits the taking.* On a judgment by default in trespass for taking property specified in the declaration, the taking of the property described is admitted, and the only proof which it is incumbent on the plaintiff to make is as to its value, and he is entitled to a verdict for the value.

Case reviewed, *Turner v. Carter*, 1 Head, 525.

FROM BLOUNT.

From the Circuit Court, E. T. HALL, J., presiding.

BAXTER, CHAMPION and RICKS, for plaintiff.

A. CALDWELL, for defendant, cited 1 Tenn. R., 18; *Turner v. Carter*, 1 Head, 520; Tidds. Pr., 503. 508.

NELSON, J., delivered the opinion of the Court.

The declaration in this case, alleges that the plaintiff sues the defendant for two thousand dollars, as damages for wrongfully taking the following goods and chattels, the property of the plaintiff, viz.: "One mare, seven mules and one bridle." Judgment by default was taken, a writ of inquiry awarded, and at the September Term, 1869, a jury was impaneled and sworn well and truly to inquire and ascertain the damages. They found for the plaintiff, and assessed his damages at five cents. He obtained a rule for a new trial, which was discharged, and thereupon he tendered his bill of exceptions, which was

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duly made part of the record, and prayed and obtained an appeal, in the nature of a writ of error, to this Court.

It appears from the evidence that two persons, who are not parties to this suit, took from the plaintiff's farm, in his absence and without his consent, one fine buggy mare, worth \$250, five mules, each worth \$150, and two mules, each worth \$100; but there was no evidence to show that defendant was present at the taking of the property, or had any thing to do with it. The plaintiff's counsel asked the Court to charge the jury that the judgment by default admitted the plaintiff's right of action, and that the plaintiff was entitled to recover the full amount of damages shown by the evidence. The Court charged the jury "that the judgment by default settled the plaintiff's right to recover *some* damages; that the amount of damages the plaintiff should recover was a question of fact purely for the jury; that they were the exclusive judges of the amount of damages that could be allowed from the proof, and could allow any sum they might agree upon, from one cent to the full amount claimed in the declaration, but could not exceed the amount claimed in the declaration; that the *usual* amount of damages in such cases would be, or was, the value of the stock and property which the proof showed the defendant had taken, or caused to be taken, at the time it was taken; and that after the jury found that amount, they might allow interest or not, in their discretion, on that amount; that it was for the jury to say, from the proof, what amount of damages the plaintiff should recover." This charge was not in conformity to the instructions asked in behalf of the plaintiff; and the

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the question before us is, whether the judgment by default so admitted the plaintiff's right of action as to entitle him to recover the full amount of damages shown by the evidence.

Where the defendant fails to appear and demur, or plead, within the prescribed time, judgment by default may be taken, under the Code, section 4239. And, by section 2975, it is provided that, "Whenever damages are recoverable, the plaintiff may claim and recover, if he show himself entitled thereto, any rate of damages which he might have heretofore recovered in any form of action, for the same cause." The declaration charges the defendant with wrongfully taking the goods and chattels mentioned in it; and there can be no question that, if the defendant had pleaded not guilty, and the jury had found the plea against him, or, in other words, that he was guilty of wrongfully taking the property, the jury would have been instructed, under the form of action in use before the Code, to assess damages to the extent, at least, of the value of the property proved. In 1 Greenleaf's Evidence, § 27, it is said that, "If a material averment, well pleaded, is passed over by the adverse party without denial, whether it be by confession, or by pleading some other matter, or by demurring in law, it is thereby conclusively admitted." And we hold that, where there is a failure to plead, and a judgment by default at law, the effect of the judgment is the same as that of a judgment *pro confesso* in equity, which admits the allegations in the bill. See Code, 4371; *Stone v. Duncan*, 1 Head, 104; *Jackson v. Honeycut*, 1 Cooper's Overton, 30-31; *Douglas v. Evans & Wheaton*, Ibid, 82-83, and Meigs' Reports, 358. In the case under

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consideration, the defendant, in suffering judgment by default, admitted that he had wrongfully taken the property, and there was no necessity to prove that fact before the jury. The only proof that was incumbent on the plaintiff to make, was as to the value of the property thus admitted to have been wrongfully taken; and his Honor erred, in not instructing the jury, as requested, to assess the plaintiff's damages at the value ascertained by the proof.

In England, from whence we derive the common law, and a large part of our pleadings and practice before the Code, a judgment by default was regarded as an interlocutory judgment, and the amount of the damage sustained by the plaintiff was ascertained, either by reference to the Master in the King's Bench, or prothonotaries in the Common Pleas, or by writ of inquiry. In general, a writ of inquiry was awarded; but as it was a mere inquest of office, to inform the conscience of the Court, the Court itself might assess the damages, with the assent of the plaintiff. 10 Petersdorff's Abr., 440. So, also, the damages could be ascertained by the Sheriff, the definition being that "a writ of inquiry is a judicial writ, issuing out of the Court where the action is brought, and directed to the Sheriff of the county where the venue is laid, setting forth the proceedings which have been had in the cause, and that the plaintiff ought to recover his damages by occasion of the premises. But because it is not known what damages he hath sustained by occasion thereof, the Sheriff is commanded that, by the oaths of twelve honest and lawful men of his county, he diligently inquire the same, and return the inquisition into court." *Ibid*, 448. The

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object of the writ was, and is, the same in this State as it was in England; but here it has always been the practice to cause the inquiry of damages to be made by a jury, under instructions from the Court, and to have their verdict returned into court.

It has been correctly said that a judgment goes by default, properly speaking, whenever, between the commencement of the suit and its anticipated decision in court, either party omits to pursue, in the regular method, the ordinary measures of prosecution or defense. Hence, judgment by default, when it goes against the defendant, is an implied admission of the charges advanced; when it goes against the plaintiff it is an admission that he cannot support those charges. 7 *Ib.*, 475. And, so conclusive are these admissions, that where the plaintiffs declared, upon a sale of coffee, at so much per cwt., which the defendant was to take away by such a time, or answer in damages, and there was judgment by default, it was held, on executing the writ of inquiry, that the defendant should not be let in to give evidence of fraud, on the side of the plaintiffs, at the sale, because he had admitted the contract to be as the plaintiffs had declared, by suffering judgment by default, instead of pleading non-assumpsit. *East India Co. v. Glover*, 1 Stra., 612; 10 Pet. Abr., 456. So, in assumpsit upon a promissory note, there was judgment by default; and, on executing a writ of inquiry, the plaintiff did not produce the subscribing witness, but offered other evidence of its being defendant's hand, and the Court held this was sufficient, for the note, being set out in the declaration, is admitted, and the

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only use of producing it is, to see whether any money is indorsed to be paid upon it. *Benns v. Lindsell*, 2 Stra., 1149; 10 Pet. Abr., 456. And, in 'an action for use and occupation, where it was contended, upon the execution of a writ of inquiry, that the plaintiff was bound to prove that the house, for the rent of which the action was brought, belonged to him, Lord Ellenborough, C. J., held that the defendant had admitted upon the record, in the judgment by default, that he occupied the house under plaintiff. *Dans v. Holachy*, 1 Chit. R., 644. 10 Pet. Abr., 457. The same view of the law was taken by this Court, in the *Union Bank v. Hicks, Ewing & Co.*, 4 Hum., 327, where judgment by default was taken in an action upon a note; and when a jury was impaneled to inquire of the damages, evidence was offered to prove the indorsement of the note a forgery; but it was held that the judgment by default was an admission of the cause of action, and that, upon an inquiry of damages, evidence showing that no cause of action existed, is not admissible.

The case of *Turner v. Carter and Pulliam*, 1 Head, 525, is not in conflict with the authorities cited. In that case, the defendant had filed an informal plea of abatement, to which a demurrer was sustained, and had then moved for leave to plead over, and accompanied his motion with pleas and a strong affidavit, showing a meritorious defense; but his motion was refused, and it was held that, 'to a limited extent,' he had the right to be heard upon the inquisition of damages. It was said that the defendant was no further compromised by the judgment by default than to preclude him from

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denying the plaintiff's right to nominal damages, and might show, if in his power, that the plaintiffs had no legal claim to damages, in which event they could recover nothing more than nominal damages. That was an action of assumpsit, in which the cause of action is not stated. This is an action of tort, in which the articles of property are distinctly specified in the declaration. There the defendants in error had shown that they had a meritorious defense, and a privilege was denied, to which they were entitled as a matter of right. Here, no effort was made to defend before the judgment by default was taken, and no proof was offered or introduced by the defendant upon the inquisition of damages. He rested his defense solely upon the ground that there was no evidence to show that he was present at the taking of the property, or had anything to do with it—a defense which would have been proper if he had pleaded not guilty; but the judgment by default, if it admitted anything, was equivalent to an admission that he caused and procured it to be done; and this might well be inferred from the proof, in connection with the other facts of the case, that he had offered a less price for the mules, a few days before, than the plaintiff was willing to take.

Reverse the judgment, and remand the cause.

Samuel C. Brown v. E. H. Stabler & Co.

SAMUEL C. BROWN, in error, v. E. H. STABLER & Co.

ACCOUNT. *From another county or State. Denial in petition for certiorari.*

A denial of the justice of an account, coming from another county or State, contained in a petition for *certiorari*, is a sufficient denial to require the plaintiff to prove his account, or to admit evidence to disprove it.

FROM CLAIBORNE.

From the Circuit Court, J. P. SWANN, J., presiding.

W. R. EVANS, for plaintiff in error.

L. A. GRATZ, for defendant, cited *Brien v. Peterman & Cope*, 3 Head, 499.

FREEMAN, J., delivered the opinion of the Court.

This was a suit commenced before a Justice of the Peace for Claiborne county, by the defendants in error against the plaintiff in error, on an account coming from another State, proven by the oath of the party, under the Code, 3780. A judgment was rendered by the Justice in favor of plaintiff below for the amount of his claims.

Some twelve months after the rendition of this judgment, Brown filed his petition for writs of *certiorari* and *supersedeas*, seeking a new trial of the case. In the petition, after giving reasons for not appealing, he denies that the debt was justly due, in these words: "So your petitioner most positively states, that said account was

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thus fully paid and satisfied, and he did not owe said plaintiff anything.

On the trial of the case in the Circuit Court, plaintiff read his account, sworn to, as evidence of his debt, which was not objected to. Defendant then proposed to prove the payment of the account sued on, which was refused by the Court, on the ground that the account had not been denied on oath.

The question in this case is, whether the denial of the account made in the petition for *certiorari*, was such a denial on oath, as put plaintiff on proof of the same, or entitled defendant to disprove the account.

We think such denial was a sufficient denial of the account on oath, as meets the requirements of the Code.

The object of this provision was to enable the plaintiff, in such cases, to have judgment without further proof, unless defendant would deny the account on oath, and thus give him notice that he must be prepared to prove the correctness of the account.

The denial of the account in the petition for *certiorari*, the petition being sworn to, is sufficient to meet this object of the statute, and puts plaintiff fully in possession of the fact, that the correctness of the account is denied.

An account thus proven, is put on the footing of a promissory note; and it has been held by this Court, that the denial of authority of an agent to put one's name as stayor to a judgment made in the petition for *certiorari*, was equivalent to a plea of *non est factum*. *McDowell v. Turney*, 5 Sneed, 225. The principle of the above case is conclusive of the present.

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We hold his Honor erred in refusing to allow defendant to show that the account was paid, and that it had been sufficiently denied on oath, in the petition for *certiorari*, to put plaintiff on proof of the same, and to allow the defendant to introduce proof that the account was not correct, as a debt against him at the commencement of the suit.

The case will be reversed, and remanded to the Circuit Court for a new trial.

NICHOLAS SHARP, in error, v. L. J. TREECE.

1. NEW TRIAL *Surprise. Affidavits.* A statement in an affidavit of a plaintiff, that the matter stated by the witness is untrue, and that plaintiff could not foresee such statement, is a sufficient allegation upon which to base an application for new trial on the ground of surprise.
2. SAME. *Affidavits. New proof.* Where affidavits of newly discovered testimony render it probable that if the new matter presented had been before the jury, a different verdict would have been rendered, the ground is sufficient.
3. PRACTICE. *Province of Judge. Not to examine witnesses.* Illegal testimony as to political opinions, brought out by a Circuit Judge, reprehended by this Court, and proper practice stated to be, to allow the parties and their counsel to present the case.†

FROM CLAIBORNE.

In the Circuit Court, J. P. SWANN, J., presiding.

W. R. EVANS, for defendant.

† See *State v. DeFreese*, Knoxv., 1870.

Nicholas Sharp v. L. J. Treece.

TURNEY, J., delivered the opinion of the Court.

The judgment of the Circuit Court must be reversed, for error in the Court, in overruling the motion for a new trial.

An action of trespass was commenced and prosecuted in the Circuit Court of Claiborne county, by the defendant in error, against the plaintiff in error, for seizing and taking of the property of the plaintiff, fifteen hundred pounds of sugar.

On the trial, the defendant in error introduced, as a witness, John McCrary, who stated "that witness, defendant and others, were staying all night at Smith Seals'. All the party went out to the barn or stable, except defendant and witness, and we did not go out. While we were sitting together by the fire, defendant told me he had had the plaintiff's property taken; that he, the defendant, went along most of the way, but stopped a little short, but in sight of the place where the goods were taken, and then returned with the soldiers; and that his son went with the wagon and got the sugar. The circumstance began by my running down the plaintiff, and letting on that I was a rebel. Defendant told me that he bought some sugar of the soldiers, and got some work done for it; and also, that they sold to other neighbors near them. Plaintiff never got me to ask defendant about the matter."

There was verdict and judgment for defendant in error. A motion for a new trial was overruled.

In support of his motion, the plaintiff in error read his own affidavit, in which he states "he was wholly

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taken by surprise by the testimony of the witness, John McCrary; that no such conversation took place between him and the witness as that detailed; that he did not remain in the house in private conversation with said witness, whilst the other men of the company went to the stable; that he and Richard Burk went in company to the house of Smith Seals, about dark. Both went with their horses, and helped to put them up and feed them. Affiant got up in the stable loft and handed down oats. Affiant could not foresee that said McCrary would state what he did, nothing of the kind having occurred. Since the trial, he learns he can prove the facts he alleges by Richard Burk."

The affidavit of Richard Burk was also read in support of the motion, and corroborates, in every particular, that of Sharp, stating further, that he has no recollection of being out of the company of Sharp that night at any time.

Taking these affidavits as true, which we must do on a motion for a new trial, the Court should have granted it.

It is clear, from these affidavits, that the plaintiff in error was surprised by the testimony of McCrary, and that he could not have been prepared to meet it.

It appears probable, from the whole case, that if the evidence of Richard Burk had been before a jury, a different verdict would have been rendered. Therefore a new trial should have been granted. 3 Hum., 223-4.

In the examination of the testimony, Alfred Fletcher, a witness, stated, in response to a question of the Court, "the defendant was acting with the rebels, and the plaintiff was a Union man."

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After the consideration of the question which disposes of the case in this Court, it is unnecessary for us to decide whether this was error. But it does become us to say that such a course by the Court, in the presence of a jury, is highly improper, and, in this instance, made reprehensible, in bringing to the consideration of the jury testimony, not only illegal in, and wholly irrelevant to, the case at bar, but political and inflammatory in its nature, which was calculated to, and doubtless did, excite and misguide the jury, impressed, as they were, with its pertinency by the question of the Court.

As a general rule, and a safe one, it is the province of a Court presiding over jury trials to try causes as presented by parties or their attorneys; to administer the law as they, by their pleadings and proof, develop it; at no time performing the office of an attorney.

Judgment reversed and cause remanded.

McDOWELL, MCGAUGHY & Co. v. JOHN and SAMUEL
KELLER, Ex'rs, &c.

1. CERTIORARI. *Excuse for not appealing.* In a petition for *certiorari*, it is not a sufficient excuse for not appealing, that the defendant had the same question pending in the Circuit Court, and understood that the Justice would postpone the judgment until that was decided, the *certiorari* being applied for two years after judgment, and several months after the decision of the court case.†

† See *Gillam v. Looney*, ante 319.

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2. SAME. *Fiat*. A *certiorari* issued without a *fiat*, is subject to be dismissed.
3. SAME. *Motion to dismiss*. A party is not bound to move to dismiss a petition for *certiorari*, until the first term after he is served with process and the service within five days before the term, will leave him at liberty to make the motion at the next term. *Ramsey v. Monroe*, 3 Sneed, 329.
4. SAME. *Same*. Where appearance is the only evidence of service, the motion may be made at the term at which the party appears.

FROM GREENE.

In the Circuit Court, E. E. GILLENWATERS, J., presiding.

R. M. BARTON, presented brief of T. A. R. NELSON, for plaintiff. He cited *Legate v. Ward*, 5 Cold., 453; *Beck v. Knabb*, 1 Tenn., 55, 56; Code, 3132, as to notice; and *Evans v. Evans*, 4 Cold., 602, 603, as to the excuse for not appealing; *Brinkley v. Burney*, 5 Cold., 101, as to diligence.

A. H. Pettibone, for defendant, cited *Uhles v. Nolan*, 2 Cold, 529; *Nicks v. Johnson*, 3 Sneed, 326.

TURNEY, J., delivered the opinion of the Court.

The motion to dismiss the petition for *certiorari* was in time, and should have been sustained.

On the 12th day of August, 1865, Samuel Keller testator of defendants in error, sued plaintiffs in error before a Justice of the Peace, on a note for two hundred dollars. The Justice of the Peace gave judgment on the 19th of August, 1865, for plaintiffs in error fo

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costs against defendants' testator. On the 4th of September, 1867, testator filed a petition for *certiorari* alleging he would have appealed from the judgment of the Justice, but for the fact that at the same time, he had another suit pending in the Circuit Court for an amount over the jurisdiction of the Justice of the Peace, upon a note from the same parties, made to petitioner, which last mentioned suit had been decided in favor of petitioner, in the Circuit Court in December, 1866; "that *petitioner* understood that the said Justice was to reserve his judgment until the decision should be made and judgment rendered in the Circuit Court." This petition was addressed to R. R. Butler, J.; has no fiat indorsed upon it; and from all we see in the record, no fiat was ever granted.

We see nothing more of the petition until the 4th day of September, 1867, when the Clerk of the Circuit Court issued a writ directed to the Magistrate, commanding him to send, inclosed and certified, all the papers in the case tried by him, to the Circuit Court of Greene County, to be held on the 2d Monday of October.

The next we see of the matter, is at the February Term, 1868, of the Circuit Court, when an order is made suggesting the death of Samuel Keller, and reviving in the names of his executors; and the plaintiff in error moves the Court to dismiss the petition for *certiorari*. There is, in fact, no cause stated in the petition for not appealing. The vague and indefinite statement of the petitioner's understanding of the suspension of judgment, is the assignment of no reason. More

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than two years have been allowed to elapse since the rendition of the judgment, and no complaint made, and several months after the judgment in the Circuit Court passed off, the petitioner acquiescing in the judgment of the Magistrate.

To the argument that the motion to dismiss ought to have been made at the first term, we answer, the plaintiffs in error were entitled to notice, by the service of process of the filing and pendency of the petition; and as there is no positive statute fixing the time of the notice, reasoning from the general rule for the service of process to bring parties into Court, we declare the rule to be, that the notice must be served at least five days before the term to which the petition is filed. Unless the defendants to the petition had such notice, they will not be in default for failing to make the motion to dismiss at the first term. We are supported in this view by the reasoning in the case of *Ramsey v. Monroe*, 3 Sneed, 329. In this case, there is no evidence of notice of the filing of the petition or its pendency, until the term at which the motion is made, and then the only evidence is the motion to dismiss. So we must conclusively infer the motion was made at the first term after the plaintiffs in error knew of its existence, and at the term when there was no obligation upon them to make the motion, or in any other manner, recognize the fact that a petition had been filed, they having no legal notice.

There was in contemplation of law, no cause pending, by virtue of the petition, as there was no fiat ordering writs of *certiorari*; and if the plaintiff, by his

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appearance, waived the non-pendency, and we do not hold that he did, the want of fiat was sufficient for dismissal. The Circuit Court overruled the motion, and there was judgment for defendants in error.

Judgment reversed, and petition dismissed.

MARY K. MCGHEE, *alias* MARY K. PARKER, in error,
v. TROTTER & CATHCART, Adm'r of T. L. D. TROTTER, deceased.

CONVENTIONAL INTEREST LAW OF 1860. *Note need not recite a loan of money.* Under the conventional interest law of 1860, it was not necessary that the note, reserving interest at a rate exceeding 6 per cent. per annum, should show on its face that it was for money loaned.

FROM MONROE.

From the Circuit Court, E T. HALL, J., presiding.

An anonymous brief on the files, for plaintiff in error, cites *Yirger v. Rains*, 4 Hum., 259; *Isler v. Brunson*, 6 Hum., 277; *Wain v. Walters*, 5 East., 10; *Sears v. Burk*, 3 J. R., 214; *Violett v. Patton*, 5 Cr., 153; *Wetmore v. Brien*, 3 Head, 723.

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W. J. HICKS, for plaintiff in error, cited *Isler v. Brunson*, 6 Hum., 278; *Bolton v. Street*, 3 Cold., 31; *Caruthers v. Andrews*, 2 Cold., 384; *Ingraham v. Phlunk*, MS., Jackson, 1866.

TROWBRIDGE & CALDWELL, for defendants.

DEADERICK, J., delivered the opinion of the Court.

This is an action of debt, brought in the Circuit Court of Monroe county, upon a note purporting to be executed by plaintiff in error, by her agent, Allen Anderson. Judgment was rendered against her in the court below, and she appeals in error to this Court.

Two questions are raised by the counsel of the plaintiffs in error:

1. That Anderson, who executed the note, had no authority to sign the name of the plaintiff in error to the note. This question was fairly left to the jury to be determined by them, upon a correct charge of the Court, and upon the evidence adduced; and we think the jury were warranted in finding that Anderson had authority, as the agent of plaintiff in error, to bind her in the execution of the note sued on.

2. It is further maintained, that the note sued on reserves upon its face a higher rate of interest than is allowed by the general law, and is therefore *prima facie* void, in the absence of any recital upon the face of the note, and averments, and proof that it was given for loaned money. The note is as follows:

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“\$100.

DECEMBER 10, 1860.

“One day after date I promise to pay to the order of Thos. L. D. Trotter, one hundred dollars, value received, with interest at the rate of ten per cent. per annum.

“M. K. MCGHEE,

“ALLEN ANDERSON, Ag’t.”

The act to establish a conventional rate of interest was passed February 21, 1860, and was repealed January 31, 1861, and was, of course, operative at the time of the execution of the note sued on. The first section of that act provides, “That *whenever* any person or persons shall contract for the loan of money, it shall and may be lawful for the lenders, or his or their assignee or representatives, to receive a rate of interest on the same, up to the time when payment is made, not to exceed ten per cent. per annum; *provided*, that the parties to the contract shall have so agreed, and such agreement be expressed on the face of the contract, whether the same be evidenced by bond, bill, note, or other written instrument.

Under this statute, we hold it is not necessary that the note itself should show that it was given for loaned money, but that the “agreement” referred to, to be expressed on the face of the contract, relates to the rate of interest, not to exceed ten per cent.; and that this rate of interest, when over six and not exceeding ten per cent., should be expressed upon the face of the note, &c.

No injury will, or can, result to the payor of the note, by omitting to recite upon its face that it was executed for loaned money. He could make his defense

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upon a proper plea, if the fact were so that the note was usurious; and this, we think, would be the proper manner in which to raise that issue and have it determined.

In this case the pleas are *nil debit*, payment, and *non est factum*; and upon these pleas the jury have found against the plaintiffs in error, and we think the finding warranted by the proof.

Affirm the judgment.

M. P. BORING, in error, v. S. E. GRIFFITH.

1. **CONTESTED ELECTION.**[†] *Not a State case.* A contested election is not a case to which the State is a party, nor is it the duty of the District Attorney to attend to it.
2. **SAME.** *Of Sheriff. Limitation.* The time within which an election of Sheriff is to be contested, is not limited to twenty days after the election.
3. **SAME.** *Same. Trial after induction.* The contest may be tried after the person, whose election is contested, is inducted into office.
4. **SAME.** *Same. Not triable under Code, 3409.* The contest is not analogous to a bill in the nature of a writ of *quo warranto*, and it can not be tried under the provisions of the Code, 3409 to 3423.
5. **SAME.** *Same. Practice.* The practice in contested elections of Sheriffs, not being regulated by law, the Circuit Courts may adopt their own practice.
6. **SAME.** *Same. Same.* Where the contestant stated the facts by petition, and prayed to make a contest, and the opposing party appeared and moved to dismiss the petition, and then demurred to the form of the proceeding, it was held error to dismiss the cause without a hearing on the merits.
7. **SAME.** *Same. Judgment after term of office expires.* Where the term of

[†]See *Blackburn v. Vick*, Nashv., January 11, 1870—a case of contested election of Revenue Collector.

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service expires before the contest is determined, this Court, upon an appeal by the contestant and a reversal, will not remand the cause, but reverse and pronounce judgment for the costs.

FROM WASHINGTON.

In the Circuit Court, E. E. GILLENWATERS, J., presiding.

A. H. PETTIBONE & H. H. INGERSOLL, for plaintiff.

R. M. BARTON, for defendant, presented brief of NELSON, J., who did not sit, having been of counsel.

McFARLAND, S. J., delivered the opinion of the Court.

This was a proceeding instituted in the Circuit Court of Washington county, in which the plaintiff attempted to contest the defendant's right to the office of Sheriff of that county. The election was held on the 7th day of March, 1868. On the 25th of the same month, the plaintiff caused a notice to be served upon the defendant, that, on the 4th Monday of June, 1868, he would contest his election as Sheriff before the Circuit Court of Washington county, then sitting; and there appears in the record a similar notice directed to the County Court of said county. On the 22d of June, the plaintiff filed in the Clerk's office of said Court, his petition, duly sworn to, in which he asks that the contest be made on the next day, being the second day of the term. The plaintiff appeared by attorney and moved the Court for a trial of the cause; and thereupon, by consent of the parties, it was ordered that the cause be continued until

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Friday next ensuing. On that day the defendant, by attorney, appeared, and moved the Court to dismiss the proceedings. This motion, at a subsequent day, was overruled. A demurrer to the petition was then filed, to which there was a joinder. This demurrer does not make any question as to the sufficiency of the causes of the contest, but is merely to the jurisdiction of the Court, and as to the manner of instituting the proceeding. Upen argument, the Court sustained the demurrer, refused a hearing, and dismissed the cause, and gave judgment against the plaintiff for costs, from which he has appealed to this Court.

Section 889 of the Code, provides as follows: "The Circuit Court hears and determines all contests of the election of Sheriffs, Clerks of the Circuit, Criminal or other Courts, whose Clerks are elected by the people, except Clerks of the County Courts." This is all that is to be found upon the subject. As to the manner in which this proceeding is to be instituted and conducted in the Circuit Court, no provision is made.

The same article of the Code designates the several tribunals whose province it is to hear and determine the cases of the contested elections of Chancellors, Supreme Judges, and other Judicial officers, and of Attorneys-General. Article 2 of the same chapter provides for the manner in which the election of Justices of the Peace shall be conducted, and article 3 specifies the mode of procedure in the cases of Judges and District Attorneys, which requires a sworn statement of the ground of contest to be presented to the Chancellor within twenty days after the election, and the Chancellor is then required

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to fix a day for the trial. But no provision is made as to the manner in which cases of contest before the Circuit Court are to be conducted.

Various questions are raised by the demurrer of the defendant; and 1st: That at that time, the jurisdiction to try the contest had been transferred to the Criminal Court, established by the act of 1867. The fifth section of the act provides that the Criminal Court thus established shall have "exclusive jurisdiction of all cases in which the State is a party, or which, by the laws now in force, require the services of an Attorney-General." Acts of 1867-8, c. 90, p. 375.

This contest is not, in any sense, a criminal proceeding, but a contest between two private individuals, as to the right to exercise the functions and enjoy the emoluments of the office. This right which the party claims to hold in the office, is defined to be an incorporeal right, and the party is attempting to enforce his right by a civil proceeding. Nor is it a case where the services of an Attorney-General are required. The provisions of the Code before referred to, in which the mode of the procedure is defined in the cases of contest as to the offices of Judge, Attorney-General, Chancellor, &c., make no provision for notice to the Attorney-General. Nor is it, in any case, made the duty of the Attorney-General to attend and take any part in the contest; and these contests have been often tried before the Courts without the State being in any manner represented. In this respect, the proceeding differs materially from the Common Law proceeding of *quo warranto*. See Code, 900-906; *Wade v. Murry*, 2 Sneed, 50; *Dodd v.*

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Weaver, 2 Sneed, 670; *Marshall v. Kerns*, 2 Swan, 68; *McCraw v. Harralson*, 4 Col., 34. We are, therefore, of opinion that the Circuit Court of Washington had jurisdiction of the case.

• The next objection is, that the proceeding was not commenced within the time prescribed by law, and particularly that it was not commenced within twenty days from the election. It will be seen that the Code provides that in the case of Judges and District Attorneys, a sworn statement of the ground of contest shall be presented to the Chancellor within twenty days. This does not apply to a case of this sort, by its express terms or by analogy; for in cases provided for in that article of the Code, the *Chancellor*, not the Court, is made the trier of the contest, and it may be tried before him at any time; and the reasons that induced the provision in the one case do not necessarily exist in the other. It will be found that there is no time limited within which the contest, in the case of Sheriffs, shall begin. If the right exists, and the remedy is given, and no limit fixed, as a general proposition, the right may be prosecuted at any time. The action can not be limited by presumption, intendment or analogy. Ang. on Lim., 485. Whether it was the intention of the Legislature to provide that these contests might be commenced at any time during the term of office, may be doubted.

There are strong reasons to suppose that the Legislature intended to provide a mode of trying the question, as to who was duly elected, and that, as far as practicable, these contests should be settled before the successful candidate is commissioned or inducted into office.

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But it is not necessary to determine this question, any further than it is presented in this case. It is clear that the June Term, 1868, of the Circuit Court of Washington county, was the earliest time at which the contest could be tried, this being the first term of the court after the election, and no other tribunal having jurisdiction; and the contestant would necessarily have the right to have the contest tried, notwithstanding his opponent may in the mean time, have been inducted into office.

The question, however, still remains, whether or not the contestant should commence his proceeding in said court in any particular time, and what is necessary to constitute the commencement of the proceeding, or, in other words, how the proceeding shall be commenced?

The section 889, of the Code, before referred to, simply provides that the Circuit Court has jurisdiction of the case. The question is, how this jurisdiction shall be exercised. As a general proposition, "whenever the provision of a statute is general, everything necessary to make such provision effectual must be supplied by the Common Law." 4 Bacon's Abr., 634.

What provisions of the common law have we to aid us in this question?

We have no assistance from the common law proceeding of a *quo warranto*, first, because the law upon this subject is not in force in this State. *State v. Lusk*, M. & Y., 287, and *Attorney-General v. Leaf*, 9 Hum., 753. And second, because the proceedings are in form and substance essentially different, the one being a civil contest between two individuals, the other is in the na-

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ture of a writ of right for the State against the party who claims or usurps an office. 3 Bl. Com., 263.

It is next argued for the defendant, that under the Code, part 3, title 2, c. 8, this proceeding is regulated. The first section of the chapter, 3409, enacts, "that an action lies under the provisions of this chapter in the name of the State against the person or corporation in the following cases," which are thereafter enumerated, and among others is enumerated the case where a party unlawfully usurps an office. Subsequent sections provide that the proceeding shall be by bill in equity. Section 3419 provides, that when the action is brought against a person usurping an office, in addition to the other allegations, the name of the person rightfully entitled to the office, with a statement of his right thereto, may be added, and the trial should, if practicable, determine the right of the contesting parties; but section 3423 provides, that "the validity of any election which may be contested under this Code, can not be tried under this chapter." From this, it is clear that the proceedings contemplated under this chapter are different from a contested election, and as the election of a sheriff may be contested under the Code, by express terms, the provisions of this chapter do not apply. In the absence of any express regulations, the Circuit Court must be left to regulate its own practice, provided no fundamental principles are violated; and, first, the Court should see that the opposing party has due notice and his day in court, to appear and resist the proceeding. In this case, written notice was served upon the opposing party, and he appeared, by attorney, and moved the Court

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to dismiss the proceeding, and then demurred to the petition. Whether this was the proper mode of commencing the proceeding or not, we are of opinion that the Court having jurisdiction of the controversy, and both parties being in court, it was error to dismiss the cause without a hearing. The Court had the power to supply defects in the proceedings, such as bond for costs, &c., or to require a more specific allegation of the ground of the contest, to be made in writing, and to make all such amendments and orders as were necessary to perfect its jurisdiction of the case. The result is, the judgment is reversed; but inasmuch as the term of office has expired, the cause will not be remanded, but judgment is rendered in favor of the plaintiff for costs.

JESSE CHILDRESS, in error, v. JOHN W. FORD.

CONVERSION. *Taking upon leave of unauthorized person.* To take for temporary use, the property of another, in the owner's absence, upon the assurance of the person on whose place the thing is kept, that the owner would not care, but with the knowledge that he had no authority to lend the thing, is a conversion.

Cases cited, *Cummings v. Bell*, 3 Sneed, 275; *Scruggs v. Davis*, 5 Sneed 261; *Foulders v. Willoughby*, 8 Mee & Wels., 540.

FROM SULLIVAN.

From the Circuit Court, before E. E. GILLENWATERS, J.

Jesse Childress v. John W. Ford.

JAMES T. SHIELDS, for plaintiff in error, cited 2 Kent, 560; Story on Bailments, § 89; 4 Hum., 472; 1 Tenn., 19, 21.

J. G. DEADERICK, for defendant.

McFARLAND, Sp. J., delivered the opinion of the Court.

This was an action of trover, brought by John W. Ford, against Jesse Childress, for the conversion of a sorrel mare, upon the following facts: Ford was the owner of the mare, and kept her in a stable which he had built for that purpose, upon the premises of John J. Cox, his step-father. Childress applied to Cox to borrow a horse to ride to Blountville, a few miles distant. Cox replied that he had no horse to loan him, but that Ford had one there, and he had no idea he, Ford, would care, and that he could have her to ride. Ford was, at the time, absent. Childress and Cox, and Finley Cox, started to Blountville together, Childress riding Ford's mare. On the road the animal stepped upon a snag, which flew up, inflicting a wound which at first, was not thought to be serious, but of which she died, some eight days after. It does not seem that any negligence is attributable to Childress, but that in common parlance, it was purely an accident. It further appears that Childress hesitated about riding the animal, for the reason that she was wild, but Cox insisted that there was no danger, and urged him to take her. Cox further says, in his testimony, that Childress would not have taken the mare without his

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permission, but that he had no authority from Ford to loan her.

Upon these facts, was Childress liable for a conversion of the animal?

In the case of *Cummings v. Bell*, 3 Sneed, 275, it was held by this Court, upon a full consideration and a careful review of the authorities, that where the defendant had hired a slave from the plaintiff, without any express stipulation as to the kind of service the slave was to render, and the defendant, without the consent of the plaintiff, sub-hired the slave to a third party, the plaintiff would have the right to treat the act as a conversion, and maintain trover for the value of the property.

The case of *Wm. Scruggs v. Ammon L. Davis*, 5 Sneed, 261, was an action of trover, for the conversion of a slave, upon the following facts: The slave had run away from his owner, and was arrested in Kentucky, and brought aboard of the defendant's steamboat at Eddyville, by Scruggs, the owner, and the passage of both paid to Nashville. Scruggs had the slave securely tied, with his hands behind him, and on the boat he was tied to a post. Sometime during the day, the engineer on the boat untied the slave, and put him to pumping water on the boat, between Eddyville and Clarksville, and the defendant was present when he untied him, and saw him; after the negro was done pumping, he tied his hands behind him again, as they were, but did not tie him to the post again.

On the next day, when they were about thirty miles below Nashville, he untied the negro again, and

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put him to pumping water, but after he was done pumping, he tied his arms as they were before, but did not tie him to the post; the negro walked about on the deck, and Scruggs, his owner, saw him, but it did not appear that he knew the slave had been pumping water. Upon arriving at Nashville, the slave was missing.

The Circuit Court held that the facts stated, amounted to a conversion, if done without the consent or approbation, either express or implied, of the owner; but further instructed the jury that, if the plaintiff was not present or did not know of the act done, at the time it was done, yet the jury might look to the character of the act done, the motive with which it was done, the circumstances under which it was done, the manner of doing it, and the relation existing at the time between the plaintiff and defendant; and if, from the whole taken together, they believed he would have consented, had he known it at the time it was done, it would not be a conversion in law, and the slave having been subsequently lost, the owner could not elect to treat it as a conversion. The jury found for the defendant.

This Court approved that part of the charge in which the Court below held that the facts in proof would amount to a conversion, if done without the plaintiff's knowledge or consent, but held that the remainder of the instruction, as above quoted, was erroneous, and entirely too vague and uncertain; and it is there stated as a general rule, "that any unauthorized assumption of ownership or control over the property of another amounted to a conversion, and subjects the wrong-doer to an action for the value."

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The Court also quote, with approbation, from an English case—*Fouldefs v. Willoughby*, 8 Meeson and Welsby, 540—that any act done with the “intention of impugning for a moment, the plaintiff’s general right or dominion over the property, would amount to a conversion.”

Applying these principles to this case, it is clear that the facts stated amount to a conversion of the property. That Childress acted in good faith can not be doubted. He took and used the mare, however, in the manner stated, with full knowledge that she belonged to Ford; and he did so without any authority from Ford, either express or implied. He doubtless believed Cox’s assurance that Ford would not care. He chose to risk this, and from this act of his this loss of the property occurred. That Childress was induced to take this responsibility from the assurances of Cox, can make no difference. Cox’s part in the transaction could, at most, but make him guilty of the conversion. Childress would, however, be likewise guilty.

It is argued, for the plaintiff in error, that the Circuit Judge should have given more specific instructions to the jury, in regard to the implied authority of Cox to loan the mare.

This instruction was not asked for, and we can not say that the facts demanded it. Cox, in his testimony, says, expressly, he had no such authority, and there is no proof in conflict with this; and Childress, in his own testimony, does not say that Cox professed to have any such authority. There is nothing in the record to

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raise the question whether Ford, after the accident, did anything to waive the conversion; and the question was not made. The verdict was for the plaintiff; the charge was substantially correct, and the judgment is affirmed.

A. P. CALDWELL, in error, v. M. D. RICHMOND.

1. PLEADING. *Puis darrien continuance. Affidavit.* It is error to allow the filing of a plea *puis darrien continuance*, the opposite party objecting, without affidavit of its truth.
2. SAME. *Same. Practice. Cause.* It is not error for the Court to allow such plea to be filed without an affidavit accounting for its not being presented sooner.

FROM HAWKINS.

In the Circuit Court, R. R. BUTLER, J., presiding.

The affidavit mentioned in the opinion of the Court, p. 470, sets forth, as an excuse for not having sooner made the defense, "that since the institution of this suit, and since the filing of his pleas in this case, he has discovered a defense which has been overlooked. * * *

And he further states that he would have entered his said defense heretofore, had he known or been advised of the facts.

JAMES T. SHIELDS, for plaintiff.

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S. T. LOGAN, for defendant.

FREEMAN, J., delivered the opinion of the Court.

This is a suit commenced by Richmond against Caldwell, in the Circuit Court of Hawkins county. The summons was returnable to January Term, 1866, at which time complainant filed his declaration.

The suit was brought "on a bond" executed by defendant below, Caldwell, and one W. C. Kyle, who was not sued, for the sum of fourteen hundred and eighty-nine dollars and thirty-five cents. Said note dated 21st of November, payable one day after date, to one W. E. N. Mark, by him assigned to H. C. P. Richmond, and by him to the complainant below, M. D. Richmond. Defendant Caldwell, filed his pleas at the appearance term, the first being a plea of payment; the second, a plea of tender of \$744.67, one-half the residue of said sum of \$1,489.35 made by him before the commencement of this suit. Issue was taken on these pleas at that term. At January Term, 1867, (on 5th of February,) the defendant obtained leave of the Court to file a third plea, which craves oyer of the bond sued on, with its indorsements, and among others set out, an indorsement on said bond as follows:

"\$867. Received of W. C. Kyle eight hundred and sixty-seven dollars in full of his half of this note, and this payment releases him of any further obligation on this note. September 7th, 1865.

"Signed,

M. D. RICHMOND."

And thereupon he pleads "that the said W. C. Kyle

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and this defendant (Caldwell) were joint obligors in the said bond, and jointly made and executed the same; and that by his said receipt and acquittance to the said W. C. Kyle, bearing date the said 7th day of September, 1865, releasing the said W. C. Kyle from any further liability on said bond, (commonly called a note), he, the said plaintiff, also released the said defendant from the payment thereof, and he is no longer bound to pay the same, wherefore the said defendant says he is wholly discharged, &c.

The record shows that defendant moved the Court, on 5th of February, the day of filing his third plea, "for leave to file a plea *puis darrien*," and offered, in support of his motion, an affidavit, which the record states, in words and figures. This paper, in the view we have taken of the case, need not be further noticed.

It is insisted by plaintiff in error that the plea thus offered should have been sworn to, and as he excepted to the action of the Court in allowing said plea to be filed, the question for our decision is, as to the correctness of the action of the Court in overruling his objection to such filing.

While we would not hold that we could reverse for the action of the Court, in allowing a plea of this kind to be filed at any time before trial, without an affidavit showing reasons why it had not been presented sooner, as we think such supplemental pleadings are clearly embraced by section 2892 of the Code, and we will presume in favor of the action of the Circuit Court, that good cause was shown before the same was allowed to

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be filed, nothing appearing to the contrary; yet we do not think that a plea since the last continuance can be filed, the opposite party objecting, unless such plea is sworn to.

Section 2909 of the Code provides, that "all pleas which deny the execution or assignment by the defendant, his agent, or attorney, or partner, of any instrument in writing, the foundation of the suit, whether produced or alleged to be lost or destroyed, *and all pleas since the last continuance, shall be sworn to.*"

That this plea was a plea since the last continuance, there can be no question. It was presented to the Court twelve months after the cause was at issue. No one would claim that we could dispense with the requirement of the first part of this section of the Code; that the denial of the execution of an instrument, the foundation of a suit, must be on oath, and that, such plea ought not to be filed, if objected to; and we are equally bound to hold the requirement of the latter part of the section as to pleas since the last continuance, must be strictly complied with. Both provisions stand on the same ground precisely, in this respect; the plain language of the statute, which we are not at liberty to disregard.

As we are compelled to reverse the case on this ground, we do not discuss or decide the question raised by the demurrer to the plea of release, as to whether it contains matter of defense to the action or not.

The case will be reversed, and remanded to the Circuit Court for trial.

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THOMAS M. BRANDON v. THOMAS DIGGS.

1. ERROR CORAM NOBIS. *Misnomer. Diligence.* A party sued, by the name of T. M. Brannon, on a note purporting to be signed by the name of G. M. Branda, returned as served by his true name Brandon, declared against as Brannon, without profert of the note, employed counsel before the war, who informed him he could find no declaration, a declaration having been in fact filed. After the war, went with his attorney and searched for the the papers, which could not be found, but at that term judgment final by default, was taken. Held, not sufficient to support a writ of error *coram nobis*.
2. DEBT. *Judgment in.* The judgment for the debt and damages are separate in the action of debt.

FROM WASHINGTON.

In the Circuit Court, R. R. BUTLER, J., presiding.

H. H. INGERSOLL, for plaintiff in error.

J. G. DEADERICK, for defendant.

J. T. SHIELDS, S. J., delivered the opinion of the Court.

On the 12th of October, 1861, the defendant in error commenced suit against the plaintiff in error and one J. H. Crouch, in the Circuit Court of Washington county, on an instrument in these words:

\$450. On or before the 15th of March, 1860, we

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promise to pay Thomas Diggs four hundred and fifty dollars for value received. This 17th March, 1859.

J. H. CROUCH,

G.M.Branda,

By J. H. CROUCH.

The original summons commands the Sheriff to summon J. H. Crouch and *T. M. Brannon*, to answer the said Thomas Diggs in a plea of debt, "that he render unto him four hundred and fifty dollars, which to him he owes and from him detains, to his damage, two hundred and fifty dollars." The process was regularly executed on both parties in time to make the cause a return to the October Term, 1861. The return of the Sheriff as to the plaintiff in error is executed on "*T. M. Brandon*," the true name of the plaintiff in error, "14th October, 1861."

The declaration was filed October 29, 1861, as appears from the official indorsement of the Clerk, and is in these words:

"Thomas Diggs v. J. H. Crouch & T. M. Brannon.

"Circuit Court, Washington county, Tennessee, October Term, 1861.

"The plaintiff sues the defendants, J. H. Crouch and T. M. Brannon, for four hundred and fifty dollars, due by promissory note or writing obligatory, made by them on 17th March, 1860, which, with the interest thereon, remains unpaid, to the plaintiff's damage two hundred and fifty dollars."

"No profert of the instrument on which the suit is brought is made, and for this reason, this loose and artificial declaration, even under the Code system of al-

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legation, was subject to demurrer, but no demurrer was filed, or other defense made; and on June 26, 1865, a judgment *final*, by default, was rendered by the Court, for four hundred and fifty dollars debt, and "the further sum of one hundred and forty-two dollars interest," and the cost of the cause.

It appears that during the next term of the court, the plaintiff presented a petition for a writ of error, *coram nobis*, which petition admits that the plaintiff in error had been summoned to the October Term, 1861, to answer Thomas Diggs in an action of debt, but states that the petitioner had no recollection of ever having had any dealing with said Diggs; *that he went to the court and employed an attorney* to defend, if necessary, who informed petitioner that he could find no declaration filed; that, in consequence of the war, the courts were soon afterwards closed; that when the courts were re-opened in June last, *he attended in proper person*, and that he and his attorney searched for the papers in the clerk's office, and being unable to find them, petitioner was told, as we infer, by his attorney, "to go his way," which he did, but left his attorney to attend to all his business; that afterwards the papers were found, and, without the knowledge of the petitioner or his attorney, the judgment was taken.

The petitioner further states that he did not, by himself or agent, execute the instrument on which the suit was brought; that if he had known that such a note was on file, he would have denied the execution of it on oath; that gross injustice has been done him; and that to correct these errors and mistakes of fact

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a writ of error *coram nobis* be granted him, the cause reinstated on the docket, and he be allowed to make defense. At the same term of the court, on the filing of said petition, this order was made: "In this case, upon a petition which shows a state of facts that, in the opinion of the Court, authorizes a writ of error *coram nobis*, it is considered by the Court that the judgment by default, entered at last term, be set aside, and for nothing held; and said cause is reinstated on the docket, in the same plight and condition it was before the final judgment by default was entered, and that a writ of error *coram nobis*, issue."

The following errors were assigned:

1. The name of the petitioner was not Brannon, but Brandon; the note sued on was signed by T. M. Branda.

2. The declaration could not be found in the Clerk's office at the October Term of the Court.

3. At the June Term, the Clerk, after diligent inquiry, could not find the papers in the office, and the counsel of the petitioner told him that he might go his way.

4. The note sued on was not made by the petitioner.

To these assignments of error a demurrer was filed and allowed.

The petition was dismissed. The cause is here by writ of error, and, therefore, the whole record is before us for review. A writ of error *coram nobis*, lies to correct an error in fact in the same Court where the record is, but the same Court can not correct an error in law, either by or without a writ of error; such error

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should be redressed by another court. *Hankins v. Bonie*, 9 Gill and Johns., 428. It is said in 2 Tidd's practice, 1137, that if a judgment in the King's Bench be erroneous in matter of *fact* only, and not in point of law, it may be reversed in the same Court, by writ of error *coram nobis*, as where the defendant being under age, appeared by attorney, or the plaintiff or defendant was a married woman at the commencement of the suit; for the error in fact is not the error of the Judge, and reversing it is not reversing his own judgment,

If the error is in an erroneous conclusion upon a question of fact, this is not the remedy. Where the error appears on the face of this record, the writ of error *coram nobis* does not lie, and the redress is to be sought in a revising court; otherwise a Court would have the power to review and reverse its own final judgment, which can not be allowed. But, if a fact existed, which was not before the Court when the judgment was rendered, and the party who seeks to prosecute the writ has been guilty of no negligence, and if the fact be such that the Court would not have rendered the judgment had it been known, then the judgment may be reached and reversed by means of the writ of error *coram nobis*. *Crawford v. Williams*, 1 Swan, 341; Stephens Pl., 118-19.

We hold that there is no error in this record. Process was regularly served on the plaintiff in error, and he attended the court at the return term, and employed an attorney to defend the suit. He was also present at the term when the final judgment by default was taken, in his own proper person and by attorney. The

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facts stated are not sufficient to excuse him from not making defense. He knew that he was sued—that the cause was in court; the declaration was duly filed, and if the writ and declaration could not be found, he should have called upon the plaintiff's attorney for the same; and in case of non-production, taken judgment of *non pros*, or brought the matter to the attention of the Court, for such order as the facts required. No declaration being in the office, in its proper place, on the fourth day of the return term, all that the plaintiff in error had to do to fully protect himself, was, to take a judgment of *non pros* against the plaintiff below. This he could also have done at the June Term, 1865. Besides, it appears that when he left the Court he left the case in charge of his attorney, whose duty it was to see that no advantage was taken. The law holds persons to diligence in the prosecution or defense of their suits in Court, and the rules of practice and pleading, which their attorneys are bound to know and observe, afford them ample protection against undue advantage. We are satisfied that there was negligence in not pleading the misnomer in abatement, the only mode in which that defense can be made, or in not pleading the alleged defense of *non est factum* in bar, and that a proper case for a reversal of the judgment on a writ of error *coram nobis*, was not made.

It is now further insisted that there is error in law in the record, because the damages in the writ are laid at two hundred and fifty dollars, and the judgment is for a much larger sum. But, as we have seen, the judgment is for the amount of the debt, and the interest by way of damages, the amount of the interest

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recovered being less than the damages laid in the writ and declaration. This is correct.

We affirm the judgment by default, and also the judgment allowing the demurrer to the assignment of errors.

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ERROR CORAM NOBIS. *Whether cause is litigated, matter of fact.* A judgment dismissing for want of sufficient bond, and awarding writ of inquiry against a plaintiff, in replevin in which witnesses had been summoned on both sides, though there was no plea, taken and executed, on a day of the term after the continuance of all "*litigated*" civil causes, and after the plaintiff and his witnesses had left the Court, is irregular and erroneous. Such error may be reached by writ of error *coram nobis*.*

FROM SULLIVAN.

In the Circuit Court, E. E. GILLENWATERS, J., presiding.

J. G. DEADERICK, for plaintiff.

McFARLAND AND COCKE, for defendant. The latter cited *Wynne v. The Governor*, 1 Yer., 150; *Goodwin v. Sanders*, 9 Yer., 92; *Merritt v. Parks*, 6 Hum., 332;

*NOTE.—It seems that the form of the order making the continuance of this cause depend upon the question whether it was a "*litigated*" cause brings this case within the class of errors of fact. If it had been continued by name, it would be error apparent on the record, and could only be reached by writ of error to the Supreme Court.

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Bigham v. Brewer, 4 Sneed, 433; *Patterson v. Arnold*, 4 Col., 364; *Crawford v. Williams*, 1 Swan, 341.

TURNEY, J., delivered the opinion of the Court.

The judgment of the Circuit Court dismissing the writ of error *coram nobis* is erroneous.

On the 20th of December, 1867, plaintiff in error filed his petition in the Circuit Court of Sullivan county for writs of error *coram nobis*, alleging that on the 6th day of January, 1866, he instituted an action of replevin in said court, against the defendant in error, for the recovery of a bay mare; that at the March Term, 1866, he filed his declaration in due time; that no plea was ever filed thereto. The affidavit upon which his writ issued was sworn to before a Justice of the Peace. At the November Term, 1867, the cause still pending, witnesses summoned by both parties were in attendance for the purpose of a trial. On Wednesday of said term an order was made continuing all litigated civil cases to the next term; that the action of replevin was one of the causes so continued; that on Saturday, the last day of the term, after plaintiff and his counsel had left the court and gone home, a judgment by default was taken against him, a writ of inquiry was immediately awarded against him and his sureties, and a verdict and judgment for more than \$400; that he had no notice of this judgment; that he had no knowledge said judgment would be rendered after the cause was continued, and prays that a writ of error *coram nobis* issue, &c.

On the petition is the fiat of E. E. Gillenwaters,

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Judge, &c., ordering writs of error *coram nobis* and *supersedeas*.

At a December Term, 1867, it is agreed by the parties that no notice issue to the defendant, but that the case stand as an appearance to the next term, subject to exceptions to be then taken by the parties.

At the March Term, 1868, the defendant obtained a rule upon the plaintiff to give good and sufficient security or justify the present on or before the next term.

At the July Term, 1868, defendant moved to dismiss the writ of error *coram nobis*, when the following order was made: "The motion to dismiss the writ of error *coram nobis* coming on for argument, and argument having been heard by the Court, as well against said motion as in support of it, and because it does not appear to the Court that any notice of the suing out of said writ of error *coram nobis* had been served on I. D. Mullinix or his attorney, nor does it appear that error has been assigned upon said writ of error, and his Honor, the Judge, being of opinion that the writs of error issued in this cause were illegally and improperly issued, there being no such error of fact in said proceedings as would justify a writ of error *coram nobis*, it is therefore considered by the Court that said writ of error *coram nobis* be, and the same is hereby, dismissed, and judgment complained of is in all things confirmed," &c.

The petition alleges, and the record of the suit in replevin, which is a part of the record here, shows the fact, that before the judgment by default was taken, all litigated cases had been continued to the next term.

The petitioner further alleges, that after the case had

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been so continued, plaintiff had "left the Court and was at home at the time the judgment was taken, and had no notice of the purpose to take the judgment, and no knowledge that the judgment would be taken." This was a fact to be inquired of by a jury. If it were true the plaintiff was entitled to have the judgment complained of revoked. At the time of the judgment by default the Court had no jurisdiction of the person of the plaintiff. By the continuance, the parties were as completely out of court as to that suit and for that term, as if they had never been in court.

The cause having been continued, no rule or other proceeding can be had in it, at that term of the court. See the manuscript opinions in the cases, *Hurst v. Selvidge* and *Lamden v. Sharp*, delivered at September Term, 1847, of this court.

The court having no jurisdiction of the case, the plaintiff can not be presumed to have notice of any step in the cause, the presumption is, that he has not such a notice; and when he alleges that he was not present and had no notice, he states a fact which is neither affirmed nor denied on the record, and which, if true, makes the judgment erroneous. "Any person aggrieved by the judgment of the County, Circuit or Chancery Court, by reason of a material error in fact, may revise the same upon writ of error *coram nobis*." Code, 3110.

The want of notice to the plaintiff, in this instance, was material error of fact, such as kept him from preventing the error complained of, and shows a surprise without fault on his part. He was entitled to his day in court, which, according to the statement in his peti-

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tion, he did not have; and of the truth of this statement he is entitled to inquiry by the country.

The motion to dismiss, made under the circumstances attending this one, will only prevail when the facts charged are not sufficient in law to entitle the petitioner to the relief sought.

The writ only serves the purpose, however, of bringing the parties, defendant, before the Court; and the failure to assign error, the assignment being in the nature of a declaration, may be taken advantage of, as the failure to declare in other actions may.

The assignment of errors of fact having been filed, the rules of pleading in actions at law obtain. 1 Swan, 342.

Under the rules laid down in the case cited, and by us, in this opinion, the judgment of the Circuit Court is erroneous, and must be reversed, and the cause remanded for the purpose of pleading and trial.

THE EAST TENNESSEE AND VIRGINIA RAILROAD COMPANY v. JAMES A. GALBRAITH, and DAVID M. GALBRAITH, Adm'r, &c.

1. SET-OFF. *When plaintiff fails.* Where there is a finding by the jury that there is no cause of action on behalf of the plaintiff, there can be no set-off allowed to defendant. 3 Head., 570.
2. SAME. *Same. Judgment.* Jury having negatived plaintiff's claim, and found for defendant in set-off, the proper judgment is, that defendant go hence and recover his cost.

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3. *SAME. Same. Same. On error.* But the verdict not being satisfactory, and the account being complicated, the Court set aside the verdict and remanded the cause for a new trial, or a reference under 2924 of the Code.

FROM GREENE.

In the Circuit Court, E. E. GILLENWATERS, J., presiding.

R. M. BARTON and J. G. DEADERICK, for plaintiff.

R. MCFARLAND and H. H. INGERSOLL, for defendants, cited the Code, 2964.

SHIELDS, S. J., delivered the opinion of the Court.

This action was instituted in the Circuit Court of Greene county, by the plaintiff in error, against defendants in error, to recover damages for the non-performance of certain conditions contained in a bond which the defendant, James A. Galbraith, as principal, and the intestate of the other defendant, as surety, executed on January 1, 1860, on the appointment of the said James A. as Depot Agent, at Greeneville.

Several pleas were filed, only two of which it is necessary to notice:

First. That the said James A. had not broken the conditions of the said bond.

Second. A plea of set-off.

The jury found the issues for the defendants, and that the plaintiff was indebted to the defendant, James

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A. Galbraith, upon his plea of set-off, in the sum of one thousand six hundred and fifty-six dollars and ninety-two cents.

The plaintiff entered a rule, to show cause why the verdict should be set aside, and a new trial granted, which was discharged, and judgment rendered upon the verdict.

The cause is now before us on an appeal, in the nature of a writ of error; and we, being of the opinion that there is error in the record, reverse the judgment of the court below.

The jury, it is manifest, found that the plaintiff had no ground of action against the defendants; in other words, that the defendant had not broken the condition of his bond. This being so, it was error to render judgment on the finding of the jury in favor of the defendants, on the issue on the plea of set-off; for the right to recover a judgment on a plea of set-off, depends entirely upon a recovery on the part of the plaintiff. If the plaintiff fail to establish any claim against the defendant, there is nothing against which the defendant's demand can be set off. The plea of set-off is a statutory defense, and did not exist at common law. In its original form, it was effective only so far as to defeat the demand of the plaintiff; but by the Act of 1852, c. 259, s. 2, it was enacted that, where the set-off pleaded by the defendant is found to *exceed* the claim of the plaintiff, the Court shall give judgment in favor of the defendant for the *excess* of the said set-off *over* the claim of the plaintiff. This statute is carried into the Code, 2922, being in substance the same as the

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Act of 1852. It is entirely clear that the statute contemplates only cases where there are cross claims or demands; where there is, in fact, something due from and to each party. Such is the plain sense of the language used, and the clearly-expressed intention of the Legislature. There is nothing in the section of the Code cited, to authorize a judgment in favor of the defendant, in a case where the plaintiff establishes no demand, whatever, against the defendant. This Court, in the case of *John S. Brazelton v. Nashville and Chattanooga Railroad Company*, 3 Head., 570, so construed the Act of 1852, and, we are of the opinion, correctly; and also that the Code enactment has not changed the law.

After a careful consideration of the evidence in the record, from which we are convinced that justice demands that the cause should be opened for another and further investigation on the merits, the case being one of complicated accounts, we have concluded to remand the cause. In strictness, perhaps, the proper judgment here would be to reverse the judgment of the Court below, on the verdict of the plea of set-off, and render judgment here in favor of the defendant, on the verdict on the issue, on his other plea.

It is provided by the Code, 2924, that, in cases where matters of set-off are pleaded, if they consist of matters of complicated account, the Court may direct a reference to the Clerk or a special Commissioner, as in the Court of Chancery, allowing a trial by jury, of any matters of fact arising upon such account, as in Chancery cases.

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We remand the cause, to the end that a new trial may be had, or a reference ordered, under the provisions of this statute, as the Court below may seem proper.

WILLIAM A. STOVER *et al.* v. JAMES ALLEN *et al.*

CONTRACT. *Construction. Stipulation as to Accident.* A stipulation in a contract for further time to finish a work, if it should be destroyed by inevitable accident, and the absence of any stipulation that the builder should be compensated for labor and material lost by such accident, is clear proof that such loss was to fall upon the builder. The retention by the employer of a large proportion of the compensation until the work is completed and received, is a ground for the same construction.

FROM GREENE.

In the Chancery Court at Greeneville, S. J. W. LUCKY, Ch., presiding.

J. G. DEADERICK & REEVE, for complainants, cited Ch. on Contr., 105, 494; *Menetone v. Athawes*, 3 Burr., 1592; Story on Agency, § 124; 2 Par. on Contr., 29, 32; Story on Contr., 698; 10 John., 203; 1 U. S. Eq. Dig., p. 35, § 287; *Young v. Thompson*, 2 Col., 596; 3 Hum., 260, 265.

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R. McFARLAND, for defendant.

TURNER, J., delivered the opinion of the Court.

There is no error in the decree of the Chancellor. On the 4th day of March, 1861, the following contract was entered into:

“Article of Agreement. I, William A. Stover, have this day bargained and agreed with a board of directors, to build a bridge across Nolachucky River, near James Johnson’s and James Allen’s, to be called, The Johnson and Allen Bridge. The said William A. Stover binds himself, in the penal sum of eleven thousand dollars, to build a bridge at the above named place, equal to a bridge known and called by the name of the Earnestville bridge, in Greene county, Tennessee; to do the work, in every and all respects, equal to the Earnestville bridge.”

The contract then sets out the specifications of the bridge, and proceeds: The above bridge to be completed against the first day of October, 1861, unless providential accidents should intervene; then, in that case, a reasonable time for said completion of the bridge. We, the said board of directors, bind ourselves to the said William A. Stover, to pay him for the above bridge building according to the following programme, viz: Five hundred dollars at the commencement of the said bridge; five hundred dollars when the masonry is half done; one thousand dollars when the masonry is completed; five hundred dollars when the main timbers are on the ground; five hundred dollars when the bridge is

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built half way over the river, and the balance when the bridge is completed and received, to amount to five thousand and five hundred dollars. To all and every part of the above, we, the directory, bind ourselves to pay the said Stover according to the above programme; and if failing to do, the said Stover is to be allowed six per cent. interest on all calls in monies not paid into his hand when called for. For all which, we bind ourselves, as directors, in the penal sum of eleven thousand dollars, for the faithful performance of the above agreement. We further bind ourselves to furnish the said Stover the right of bank and ways for ingress and egress, rock quarries and framing yards, &c. We further agree together that on any difference in the final settlement of the above agreement, that the said Stover and directors are each to choose two men, and in case they should fail to agree, then the arbitrators to choose the umpire, and the decision to be final between us.

“Signed, sealed and delivered in the presence of us, this 4th day of March, 1861.

“WM. A. STOVER, [L. s.]

“WM. GIRDNER, Chairman, [L. s.]”

Under the above contract the work of building the bridge commenced, but after progressing to a considerable extent, and before its completion, a flood came and washed it away. The builders re-commenced, and completed nearly all the work, excepting, perhaps, a part of the floor. The contractor, Wm. A. Stover, with his partner, subsequently taken, files this bill to recover not only the sums stipulated in the contract, but also

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compensation for the additional labor and material, made necessary by the flood, insisting that under a proper construction of the contract, they are thus entitled; that the contract was not by them a covenant against the act of God. To determine the meaning of this mutual covenant, we must look to its several parts. In doing so, we conclude the builder took the risk of flood and all other inevitable accidents. In the first part of the contract, which is peculiarly the covenant of Stover, it is provided, "The above bridge to be completed against the first day of October, 1861, *unless* providential accidents should intervene, then, and in that case, a reasonable time for said completion of the bridge."

In this clause, we see, not inferentially, but with positive certainty, the contractor securing himself against inevitable accident, and inserting a condition protecting himself from loss, by liability on his covenant, for a failure to complete the work in the time fixed, if such inevitable accident shall overtake him in his work. Having an eye, then, to this probability, and understanding, as he did, the danger to the work, and fully appreciating the character of that danger, we conclude, undoubtingly, that he not only fortified himself in the time for the completion of the work as prescribed in the conditional clause, but that he also made his prices in view of the chances for such accident as did befall him.

If this interpretation of the instrument needs support, we find it in the terms of payment. By them, fifty-five hundred dollars are to be paid for the work, payments to be made at intervals, with the striking

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provision that the last payment, of twenty-five hundred dollars, is to be paid "when the bridge is completed and received." This was the opinion of the Chancellor; he so pronounced.

We affirm his decree, and remand the cause for its execution.

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COMPOUND INTEREST. *When not allowed.* A settlement and payment of a debt, with compound interest, where there has been no previous contract to pay interest at stated periods, or to pay interest in that mode, and there is no indulgence granted for the future, or other new consideration for the payment of the compound interest, will be set aside as to the excess of the compound over the simple interest.†

Case cited, *Hale v. Hale*, 1 Cold., 233.

FROM GREENE.

From the Chancery Court of Greeneville, SETH J. W. LUCKY, Ch., presiding.

NELSON, J., being of counsel for complainant in the court below, did not sit in this cause. His brief was presented by R. M. BARTON. S. T. LOGAN, also appeared for complainant.

R. McFARLAND, for the defendant.

†See *Woods v. Rankin*, Nashv., Dec. 10.

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DEADERICK, J., delivered the opinion of the Court.

The complainant filed his bill in the Chancery Court at Greeneville, to compel defendant to account for usurious interest charged to him in their settlement.

It seems that Ward conveyed to Brandon a tract of land by deed, bearing date 25th December, 1833, for the alleged consideration of \$119.20.

On the next day, 26th December, 1833, Brandon executed a bond to Ward, binding himself to re-convey the said land to Ward upon the payment to him, on or before the 25th of December, 1835, of the sum of \$119.20.

Ward also owed Brandon two notes, due 1st March, 1839, one for \$75, with a credit thereon of \$58, endorsed as received 19th February, 1852, and the other for the sum of \$42.28.

Ward sold his land in March, 1860, to one Isaac Smith, including the fifty acre tract previously conveyed to Brandon, and at or about the time of the sale, complainant and defendant made a settlement with a view to Brandon's getting the payment of the amount due him from the proceeds of the sale.

Brandon said that all he wanted was his money and interest, and that executors and administrators were entitled to exact interest every two years, and then add the interest and principal together, and count interest upon both. Ward did not assent to this, but Brandon said the Supreme Court had decided to that effect, and such seems to have been the basis of their settlement, and payment from the proceeds of the sale of the land was made upon this settlement.

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Brandon thereupon conveyed the fifty acre tract of land to the purchaser, and Ward conveyed two other small tracts adjoining.

Brandon, in his answer, claimed that he had purchased the fifty acre tract from Ward, and that the amount he had received from Smith was the price at which the tract was estimated in the sale; but his declarations about the time of the sale, and especially his bond of the 26th December, 1833, disprove his title to the land, and show very satisfactorily that it was only held by him to secure the payment of the debt of \$119.20.

The indebtedness of Ward to Brandon, as appears from the record, consisted in the two notes of \$75, and \$42.28, and the \$119.20, mentioned in the deed and bond, upon which complainant claims to have made payments, before the final settlement and payment.

Upon these debts, under the illegal and unauthorized mode of computing interest adopted by the defendant the complainant was made liable to defendant in about the sum of \$800, under the impression, perhaps, made upon complainant by defendant, that it was lawful for an executor or administrator thus to compute interest.

Interest is the compensation which may be demanded by the lender from the borrower, or by the creditor from the debtor, for the use of money. Code, 1943. The amount of said compensation shall be six per cent. per annum, and every excess, over that rate, is usury. Code, 1944.

And, the amount upon which interest may be computed, shall be the sum expressed in the contract. Code, 1949.

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Such was the law at the time of the contract or settlement between the parties, in 1860.

The case of *Hale v. Hale*, 1 Cold., 233, is referred to by defendant's solicitor, as sustaining the fairness and legality of the transaction in this case.

In that case, it appears that the parties, who were brothers, had had numerous business transactions, extending through several years, and, upon a final settlement between them, one fell in debt to the other in the sum of \$813.51. Included in this balance, was the amount of several small notes, the interest upon which had been computed and added to the principal, each year, thus making interest bear interest.

For this sum of \$813.51, a bill single was executed, and a bill was, after judgment on the note, filed, to be relieved of the usurious interest.

The Court held, in that case, that compound interest was not usury. For "it is plain," say the Court, "that computation of interest, *turned into principal*, does not increase the rate of interest upon the amount of the original loan;" that parties to a contract may stipulate that the interest shall become principal and bear interest, if it is not paid at the time agreed upon for payment; and after interest is due, the parties may agree that such interest may thereafter carry or bear interest, and, of course, be incorporated with the principal, payable at a future day.

The Court further say, "that when the payment of interest, at stated periods, forms part of the contract, and the payment of the principal sum is postponed to

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a distant day, upon the faith of the agreement for a regular and punctual discharge of the interest at the times agreed upon, equity and good conscience, at least, require that the debtor should fulfill his engagement, or render to his creditor the usual equivalent for the non-payment of the interest at the times agreed upon." And, "that if it was stipulated in the original contract that the interest should be compounded, if not punctually paid, there was nothing illegal, immoral, or contrary to public policy in such a contract."

In the case of *Hale v. Hale*, at the time of the settlement, a new note was taken for the balance due, and the interest included in it, payable, it may reasonably be inferred, at a distant day; and this consideration of further indulgence on a claim, which might be presently enforced, is manifestly regarded as sufficient to sustain the obligation to pay the interest, and to legalize its incorporation in the note as part of the principal.

In this case, however, there was no contract in the origin of the transaction between these parties, that interest should be paid at any future stated periods, or in default of such payments, that it should be converted into principal, and itself bear interest.

Nor, at the time of the final settlement, was there any agreement of further indulgence, or any other legal, equitable or moral consideration, to support a promise to compound interest to accrue in future, and make it interest-bearing principal. The payment was then made of the principal, as well as of the interest. The whole indebtedness of complainant to defendant was discharged

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at the time at which it is alleged the promise to pay compound interest was made.

There were two species of indebtedness from complainant to defendant, arising out of his written obligation. One, the principal, being the amount expressed upon the face of the several written obligations or notes; the other, the interest, which the law says shall be computed upon the sum expressed in the contract. The whole amount paid was paid as principal or interest. The amount of principal paid is the aggregate sum "expressed in the contract," and the residue of the payments were payments of interest. And if the amount of such payments of interest exceeds the amount of legal interest upon the principal sum, the contract is usurious to the extent of such excess.

Experience has demonstrated that many devices are resorted to evade our statutes against usury, and the Courts look rather to the substance and effect of, than to the form of the contract, in determining its character.

We are, therefore, of opinion that, in this case the contract was usurious, because the interest taken was upon the original principal, no agreement or contract, previous to the time of its payment, having been entered into between the parties, by which any part of the previously accrued interest had become a part of the principal. And it makes no difference by what process the parties ascertain the amount, it is, in substance, taking more than legal interest, and whether done directly or indirectly, it is equally unlawful.

Upon the subject of allowing interest upon interest, the authorities are conflicting. In many of the States

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it is held, that notwithstanding an agreement to postpone the payment of the principal, and though there be an express agreement, in a note or bond, to pay interest at a specified time, as annually, &c., yet interest upon interest will not be allowed, but it will be considered that the holder, by neglecting to call for it, waived his right to have it converted into capital. 1. Am. Lead. Cases, 522.

The decree of the Chancellor will be reversed, and the cause will be remanded for the taking of an account between the parties, showing the amount of indebtedness of complainant to defendant, with simple interest thereon, and the amount of complainant's payments to defendant, and crediting him with whatever sum he may have paid defendant over the amount of the debts due, and legal interest, for which he will be entitled to a decree.

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STAYOR AND SURETY. *Order of Liability.* On an authority, given by a stayor to a security, to enter his name as stayor on a note of about \$20, on which he was security, and two others, principals, the authority being presented by the surety to the J. P., the stay was entered and the surety said, "Now I am released." Afterwards the stayor admitted in writing that he stayed the debt for the two principals. Held, that the surety was liable before the stayor, he having assented to the stay.

FROM KNOX.

In the Circuit Court, E. T. HALL, J., presiding.

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W. P. WASHBURN, for the plaintiff in error.

M. L. HALL, for defendant.

SNEED, J., delivered the opinion of the Court.

This cause originated before a Justice of the Peace. The plaintiff moved for judgment against the defendant for the amount of an execution and costs, which, it is shown, was paid by plaintiff, and which, he alleges, he paid as stayor for the defendant. The judgment before the Justice was for the plaintiff, from which defendant appealed to the Circuit Court. On the trial before the Circuit Court, it was shown that, on the 5th of May, 1866, a judgment was rendered by said Justice, on a promissory note, for \$203.29, in favor of Hugh Dowling, administrator, and against E. P. Cawood, John W. Earley, and the defendant, Thomas Crookshank. The judgment was for \$205.79 and costs. It appears that defendant was security on said note, and the judgment recites the fact. On the 6th of May, 1866, the day after the judgment was entered, the defendant, Thomas Crookshank, went to the Justice, and delivered to him the following order for a stay:

“MR. THOMAS CROOKSHANK—SIR: You are hereby authorized to use my name as stayor to a note for about \$200, where E. P. Cawood and John W. Early are principal, and yourself as security.

“May 1st, 1866.

JOHN W. STINNETT.”

The Justice, who was made a witness in the cause, states, that when the defendant brought him the order, he hesitated in accepting the plaintiff as stayor, because

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he knew nothing of his solvency, and thereupon the defendant assured him that the plaintiff "was good," and, *at the instance* of the defendant, he entered the plaintiff's name as stayor; that neither of the defendants were present, nor did either of them ask for the stay. When the stay was accepted and entered, the defendant observed, "That lets me out." It is shown that the other defendants to the judgment were non-residents of the county, and probably insolvent. Indeed, the proceedings before the Justice do not show that the process ever was executed against defendant, John W. Early, although the judgment is against all the defendants. The defendant, Crookshank, produced, upon the trial in the Circuit Court, the following statement in writing, and proved its execution by the plaintiff:

"AT HOME, February 7, 1867.

"This is to certify that I did stay a note for E. P. Cawood and John W. Early, for two hundred and two dollars, executed to Hugh Dowling, as administrator of James Calloway, Sr., deceased. I certify further, that Thomas R. Crookshank did not have any agency whatever in procuring me as stayor, as I stayed the note for Cawood and Early, and not for Crookshank, he never having spoken to me up to that time.

"JOHN W. STINNETT."

The Code provides, that where the principal and the surety or endorser are sued, and the execution is stayed without the request or consent of the surety or indorser, the stayor shall be liable, in default of the principal debtor, to pay the debt and costs of judgment, and the first surety or endorser shall be exonerated, unless the

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principal debtor and stayor shall both become insolvent, or unless the first surety or indorser specially join with the debtor in procuring the stay. § 1973.

By § 3028 it is provided that, when the judgment or decree is against a principal and his surety, it shall be the duty of the officer having the collection thereof, to exhaust the property of the principal, both real and personal, before proceeding to sell the property of the surety. And by the section which follows, the term surety is interpreted to embrace accommodation indorser, stayor, and all other persons whose liability on the debt or contract is posterior to that of another.

It is provided, in 3061, 3062 and 3067, that the Justice shall not enter security for the stay of execution for any defendant, bound as surety or indorser on the original debt, when the surety is offered by the principal, or unless the defendant assents in proper person, or by writing signed by him, and showing that the stayor is entered as such at his instance and request; and that the stayor who becomes surety at the instance of the principal in the judgment, shall be first liable, in default of the principal, before the original surety or endorser; and the stayor who pays off the judgment may have his judgment over by motion against *his* principal, before the Justice having lawful possession of the papers, for the amount so paid, with interest and costs, and the defendant shall not be entitled to stay the execution on such judgment. This provision is substantially repeated in 4171, except that a stay of such judgment is allowed, if the surety for such stay consent thereto in writing.

The question in this case, is upon the construction

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of the foregoing provisions of the Code, as to the liability of the defendant to the judgment by motion.

We can scarcely interpret a law correctly, without first considering the reason thereof. The simple object of the law in thus postponing the liability of a surety or indorser, and making the stayor first liable, was to protect the surety or indorser, whose debt is stayed from the probable consequences of delay in the collection of the judgment, when such delay was occasioned without his consent or procurement. It could not be presumed that the surety or indorser, against whom, and his principal, a judgment had been rendered for the debt, would assume the liability for eight months' additional interest on the debt, to say nothing of the intermediate risk of the insolvency of the other parties, unless he positively assents thereto. The moment judgment is rendered against the principal and surety, the liability of both is fixed, and after the lapse of two days, if there be no stay or appeal, the plaintiff may have his execution against the parties, which the officer is required to levy in the order of their liability. The surety, in default of the principal, is liable for the judgment, interest and costs; and if the judgment be stayed, without his consent or procurement, it would be alike unjust and oppressive to impose upon him the additional interest in the first instance. Thus, it is said that the relation of principal and surety, is contracted between the stayor and the party for whom he stays the judgment, by the agreement to stay. 2 Meigs Dig., 657. The principal of the stayor, is the party for whom he stays the debt, and at whose instance it is stayed. And thus, it is

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provided, that the stayor, who pays off the judgment, may have his judgment over, by motion against *his* principal. Code, 3067. Now did the defendant, in this case give his consent to the stay, or was it done at his instance? If so, his liability is fixed.

The plaintiff affirms that he did not procure the stay, and this the defendant denies. In support of his position, he produces a paper, executed by the plaintiff, purporting to be a certificate of the plaintiff, that he did not stay a "note" therein mentioned, at the instance of the defendant, but by the special request of the principal in said note. This paper does not describe the note on which the judgment was rendered, either in its date or amount, nor does it give the date of the judgment or the name of the Justice, or any other fact from which we might be assured the cases are the same, nor is there the slightest extrinsic evidence of their identity. It may state the truth, and yet may refer to a totally different judgment. But even if it did, it so far ignores the prominent and undisputed facts in this record, that, strange and unexplained as it is, we can not accept it in exoneration of the defendant, in this case. The law only requires that the defendant should have assented to the stay, in order that his liability should be fixed. Suppose it be true that the principals in the note procured the stay, but defendant appeared before the Justice and assented to such stay. Would he not, under the law, be liable to the motion? We think he would. But here we have a much stronger case. We have the defendant acting as the special messenger of the plaintiff, and carrying to the Justice the order of

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the plaintiff to enter his name as stayor. But this is not all. We have him before the Justice, assenting to the stay, and urging the same. We have the Justice hesitating to accept the stayor, and the defendant avouching the solvency of the stayor, and we have the sworn testimony of the Justice, that the stay was entered at the instance of the defendant. These facts are conclusive against him. The remark of the defendant, at the moment of the acceptance of the stay, "that lets me out," only shows that he thought he was skilfully conniving at his own deliverance, though he was doing precisely what the law required him to do, in order to fix his own liability. If he had asseverated his dissent at the moment he betrayed his anxiety; if he had stated to the Justice that he was merely representing his principals in being the bearer of the order, the case would be presented in a different aspect. It is urged at the bar, that the insolvency of the plaintiffs, in the note, does not sufficiently appear. We can not see how that question can affect the defendant's liability here. If he, alone, procured or consented to the stay, then he is the plaintiff's principal, against whom, when the debt is paid, this motion could be maintained. If, on the other hand, the stay was for all the parties, and the stayor pays the debt, then the motion is available against all or either.

The judgment is reversed, and a judgment will be entered here for the amount paid by the plaintiff, with interest and costs.

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JOHN HUNT v. PHILIP MCCLANAHAN *et als*.

1. ATTORNEY'S LIEN FOR FEES. *On property in litigation. Petition to declare lien.* Attorneys, solicitors and counsel have a lien upon property, recovered or protected by their services, which may be declared, by order in the cause in which the services are rendered.
2. SAME. *Same. Lis Pendens.* The client cannot, while the suit is pending, so dispose of the subject matter in suit, as to deprive the attorney of his lien, nor, afterwards, to any purchaser, with notice.
3. SAME. *Same. Secured by decree, etc.* The pendency of the suit is, of itself, notice to all persons, and the lien may be preserved and notice of it extended, by stating its existence in the judgment or decree.

The petition mentioned in the opinion, sets forth that the petitioners were counsel and solicitors for the complainant; that the object of the bill was to perfect and maintain the title to a tract of land, purchased by complainant from defendants, heirs of Robert McClanahan, and to enjoin the sale of the land, under a fraudulent judgment obtained by defendant, Philip, as administrator of said Robert McClanahan.

The original case shows that the lands were in possession of complainant, under deeds from the heirs.

Petitioners cited *Read v. Bostick*, 6 Hum., 323; Cross on the Law of Lien, 32 Law Lib., 146, 149, 153, 4, 160; U. S. Digest, p. 334, § 243, p. 335, § 274, p. 336, §§ 283, 286; 1 Supl. U. S. Dig., p. 223, §§ 110, 114, 123; 12 U. S. Dig., p. 54, § 34; 14 *Id.*, p. 64, §§ 49, 50; 16 *Id.*, p. 82, § 38; 18 *Id.*, p. 91, § 31; 20 *Id.*, p. 122, § 75; 1 U. S. Eq. Digest, p. 113, § 43; 1 Clinton's N. Y. Dig., p. 278, §§

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91, 2, 3, 6; p. 280, §§ 111, 114; 2 Spence Eq. J., 780, 799, 800.

NELSON, J., delivered the opinion of the Court.

On a former day of the present term, a decree was pronounced in this case in favor of the complainant, for the tract of land in the pleadings mentioned, and a petition was presented by James P. Swann, R. M. Barton and R. McFarland, representing, among other things, that they were solicitors of complainant in the court below, and in this court, and had rendered valuable professional services to him; that he has removed to a distant part of the State, and is either insolvent or so embarrassed in his circumstances, that he cannot pay the fees; that but for their services the land would have been lost; and they pray that a lien may be declared on the land in their favor for their fees, or that such other order may be made, as will do them justice in the premises.

We have delayed any action on the petition, because of an intimation that it had been, at some period, decided by our predecessors that no lien exists in favor of an Attorney, by reason of his mere relation as such, upon the real estate in litigation; but no such case has been produced, and so far as our researches have extended, there is no reported case in this State to that effect.

In *Read v. Bostick*, 6 Hum., 323, it was decided that when the proceeds of the sale of land have come into the hand of an attorney, he may retain, for the

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value of his services as such, in procuring the sale. In *Benton v. Henry*, 2 Cold., 86, it was declared that a contract by attorneys with their client, to obtain their fees out of money in litigation, when collected, was not champertous, and was nothing more than the right given them by law, as they had a lien on the funds when collected, which could have been enforced by motion, if the fund was in court. The case of *Hoag v. Avery*, decided at Jackson, April Term, 1866, is not reported, but cited in 1 King's Tenn. Dig., 123, No. 270 and No. 271, and in Heiskell's Dig., p. 220, § 2, par. 2, to the effect that when a suit is compromised in good faith, and the property given to one party, the attorney of the adverse party has no lien on the property for fees; but it would be otherwise if the compromise were made collusively, to defeat the lien.

As land in litigation is generally as much in the custody of the law as a pecuniary fund under control of the Court, it is difficult to perceive why an attorney is not entitled to a lien for his fees, just as much in the one case as in the other. Nor can any valid reason exist why the lien, which is enforced every day in favor of vendors, mechanics, carriers, landlords and others, to whom property is entrusted for safe keeping, improvement, repairs, or other work to be done upon or in reference to the specific article delivered, shall not be declared in favor of attorneys, upon the property in litigation. In England, it has been decided that a solicitor prosecuting a suit in Chancery to a decree, has a lien on the estate in the hands of the person recovering, but not in the hands of the heir. *Barnesley v.*

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Powell, Amb., 102; Cross on Law of Lien, 32 Law Lib., 146 top, 215, m. In the work last cited, it is stated that there are two kinds of lien, which the solicitor is held to be entitled to, in equity, for his costs—first, on the funds recovered, and secondly, on the papers in his hands. *Ib.*, 216, m. It is said further, that there must constantly occur cases in which justice and the necessity of parties may render it necessary for the courts to interfere, to compel the production of papers detained by way of lien; but until the demand authorizing the detention be paid, or otherwise satisfied, any application to a court, or to a Judge at Chambers, that they may be delivered up, will be unsuccessful, *ib.*, 233, m.; and the Court will not order the personal representative of a solicitor to deliver up the papers in a cause to another solicitor, without payment or security, for payment of the solicitor's bill. *Ib.*, 238.

The full force of these decisions is obvious when it is remembered that, although the doctrine as to the creation of an equitable mortgage, by the deposit of title deeds, has not prevailed in this State, it is in full force in England, where it is held that such deposit is of itself evidence of an agreement executed for a mortgage of the estate. Coote on Mortg., 16 Law Lib., 195, m.; Cross on Lien, 144, m.; 2 Spence Eq. J., 781, m. If an attorney, therefore, can, in England, retain the title papers of his client, as against him, his heirs and representatives, although he can not directly enforce it as such, it is equivalent to his having a mortgage for his fees on the real estate in litigation, to secure their payment. 2 Spence Eq. J., 799, 800. In Cross on

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Lien, it is stated further, that it is not only consonant with justice, but with the true interests of clients themselves, that the power of the Court should at all times, be exercised for the protection of attorneys in the recovery of the costs incurred in the prosecution of their clients' claims. *Ib.*, 227, m. And it has been held that the lien of an attorney for his bill of costs extends to money levied by the Sheriff under an execution on a judgment recovered by his client, and he is entitled to have it paid over to him, notwithstanding the Sheriff may have received notice from the party against whom the execution has been issued to retain the money in his hands, and that the Court would be moved to set aside the judgment for irregularity, and even though a docket has been struck against the client, who has become bankrupt. *Ib.*, 220, m. And if the defendant, collusively with the plaintiff, settle an action by depositing a bill of exchange in the hands of a third party, the Court will order the bill to be given up to the plaintiff's attorney. *Ib.*, 228, m. And since parties can not, by their own agreement, divest the attorney of his lien on the judgment, neither can they by a reference to arbitration. *Ib.*, 230.

So, also, in England, a solicitor has a general lien for his costs, &c., on the papers in his hands, and it seems that he may obtain an order to prevent his clients from receiving money recovered in a suit until his bill be paid. Coote on Mortg., 16 Law Lib., 12, 13, m.; See, also, *ex parte* Nesbitt, 2 Sch. Lcf., 279, m.; *ex parte* Moule, *in re*, Dark, 5 Mad. Ch. R., 464, 465, m.

These general principles, moulded and adapted to the character of the litigation in the United States, have

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been applied, in numerous cases, in our American courts. See *Rust v. Larue*, 4 Litt., 217; *Coldwell v. Shephard*, 6 Monroe, 392; *Heart v. Chipman*, 2 Ark., 492; *Pinder v. Morris*, 3 Caines, 165; 10 Wend., 617; 15 Johns, 465; 1 Cow., 172; 3 Verm., 149; 20 Pick., 259; 2 Met., 478; 11 New Hamp., 163; 4 Sandf. Sup. Ct. R., 661; 8 Texas, 153; 8 Ark., 193; 1 E. D. Smith, N. Y. Rep., 598; 8 Florida, 183; 12 Conn., 444.

Among other cases decided in other States, A instituted an action for partition, and after his attorney had become entitled to about \$75 for his fees and over \$100 for disbursements, the plaintiff assigned all his share in the property to B and others, who insisted on substituting another attorney, without paying the first anything. The Court refused the substitution until all the disbursements were paid. Afterwards, the property was sold, and by order of the Court all the costs of the plaintiff's were deducted, before the fund could be distributed, and those costs were brought into court that the Court might determine who was entitled to them; and it was held that no one could have a more equitable title to a share than he by whose exertions the whole fund was created; that the assignees taking an assignment of the action as it stood, took it with all the burdens upon it, and one of these was the liability to have the costs thus incurred deducted from the amount of costs recovered, and it was ordered that the first attorney should be allowed out of the fund all his adjustable costs. *Creighton v. Ingersoll*, 20 Barb., N. Y. R., 541.

It has been held in New York that the attorney has a lien on the judgment for his costs, and if the defend-

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ant, after notice, pay them to the plaintiff, he pays them in his own wrong; but a settlement made by the defendant in good faith will protect him. See cases cited in 1 Clint., N. Y. D., 278, § 96.

In England and New York, costs are allowed to attorneys and solicitors in each cause; but, in this State, the tax fees formerly allowed to attorneys were repealed, and their fees depend entirely upon contracts, either express or implied, for their services. It was long since decided, in the case of *Newnan v. Washington*, Mart. Yerg., 79-82, that the common law doctrine that neither a physician nor a counsellor can recover upon a *quantum meruit* for professional services, because the services rendered by those professors are merely honorary and gratuitous, has never prevailed in this State. It has been decided in this Court, in other cases, that contracts between attorney and client, pending that relation, require the utmost fairness and good faith on the part of the attorney, because of their confidential relation; and attorneys have been generally treated and regarded, in this State, as standing in the relation of officers of the court, and, to a considerable extent, under its general supervision and control. They may be fined for misconduct, and stricken from the roll for malpractice. Summary proceedings may be instituted against them, as against Sheriffs, Constables and Clerks, for failing to pay over money. They may be disbarred and disqualified from holding office for fighting a duel; and while it is the duty of the courts to protect clients against all unfair advantages on the part of their counsel, it is a duty of equal

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obligation to shield the attorney, so far as practicable, against the bad faith and ingratitude of clients.

The lien of a vendor of land is enforced in equity against the vendee, although no reservation of a lien is contained in a deed. His equity grows out of the transaction, and we hold that an attorney is entitled to an equitable lien on the property or thing in litigation for his just and reasonable fees, and that the client cannot, while the suit is pending, so dispose of the subject matter in suit as to deprive the attorney of his lien, nor afterwards to any purchaser, with notice. The pendency of the suit is, of itself, notice to all persons, and the lien may be preserved and the notice extended, by stating its existence in the judgment or decree.

In the case under consideration, if there be any purchasers of the land since the commencement of the suit, we can make no decree against them, as they are not before us; but the Master will hear proof, and report what will be a reasonable compensation to petitioners; and their lien, to that extent, will be declared as having existed from the commencement of the suit, and be enforced by a proper decree.

Penniman Brother *et als.* v. W. B. Francisco *et als.*

PENNIMAN BROTHER *et als.* v. W. B. FRANCISCO *et als.*

1. DISTRIBUTION. *Niece preferred to grand niece.* A grand niece does not take any share in the distribution of an intestate's estate, where there are brothers and sisters, nephews and nieces.
2. DESCENT. *Grand uncle not ancestor of parent.* Lands descended from a grand uncle, as they do not descend from the ancestor of a parent, are not subject to the rule of the Code, 2420, par. 3, but to that of par. 1, and descend without reference to the source from whence derived.
3. SAME. *Father when heir to child.* In such case, a father, if living, will inherit from his child an estate derived from an uncle on the mother's side, in preference to the heirs of the child, on the part of the mother.†

FROM HAWKINS.

In the Chancery Court at Rogersville, SETH J. W. LUCKY, Ch., presiding.

S. T. LOGAN, for complainant, cited Code, 2430, as to distribution. Code 2420, sub. secs. 1, 3; Act of 1842, c. 169; 1784, c. 22; *Beaumont v. Irwin*, 2 Sneed, 301; *Latimer v. Rogers*, 2 Head, 692, as to descents.

J. T. SHIELDS, for defendants.

NICHOLSON, C. J., delivered the opinion of the Court.

The facts on which the question in this cause arises, are as follows: Jacob Burris died in 1861, in Hawkins

† See *Towles v. Rains*, Nashv., January 11, 1871, construing the same clauses.

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county, intestate, unmarried, and without issue. At the time of his death he left, as his heirs and distributees, his brother, John Burris, Will. B. Francisco, a nephew, being a son of Nancy Francisco, deceased, who was a sister of said Jacob Burris, and Nancy Smith, a granddaughter of William Burris, deceased, a brother of said Jacob Burris; the grand-father, grand-mother and mother of said Nancy Smith having died in the life-time of said Jacob, leaving surviving him the said Nancy Smith his grand niece, and her father, William M. Smith. After the death of said Jacob Burris, his said grand niece, Nancy Smith, died intestate, without issue, and unmarried, leaving her father, William M. Smith, surviving her. The question is, who was entitled to the share of said Nancy Smith in the real and personal estate of the said Jacob Burris? The personal estate of said Jacob Burris had not been distributed at the death of said Nancy Smith, nor had the real estate been partitioned. The Chancellor decreed that William M. Smith was entitled to take one-third of the personal and real estate of Jacob Burris, deceased, as the representative of his daughter, Nancy.

The decree as to the distribution of the personal estate of Jacob Burris, deceased, was erroneous. Nancy Smith, being the grand-niece of Jacob Burris, could not, under the existing state of facts, be a distributee of his personal estate. By section 2430 of the Code, "there is no representation among collaterals, after brothers' and sisters' children."

The Chancellor's decree as to the real estate was correct. By section 2420, it is provided that, "the land of an intestate owner shall be inherited in the following

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manner by his lineal descendants, collateral kindred and ascendants." Three classes of cases are then provided for, having reference to the sources of the intestate's title:

First. "Without reference to the source of the intestate's title; if there be no issue, nor brothers or sisters or their issue, and either parent be living, then by such parent." Nancy Smith derived her title by descent from her grand-uncle, and she died intestate, leaving no issue, nor brother or sister or their issue; but she left her father, William M. Smith, living. He is, therefore, entitled to her share in her grand-uncle's real estate, unless the exceptions or restrictions in the other two classes provided for defeat his right.

The second class is: "If the estate was acquired by the intestate, and he died without issue, his land shall be inherited as follows," &c. The manner of descent is then set out; but, as Nancy Smith did not "acquire" her title, the descent from her can not be regulated by the second class.

The third class is: "Where the land came to the intestate by gift, devise or descent from a parent or the ancestor of a parent, and he die without issue," the mode of descent is then laid down. But Nancy Smith did not derive her title by gift, devise or descent from a parent or the ancestor of a parent; but she derived it by descent from the uncle of her mother. The descent from her, therefore, is not governed by this class of cases.

It follows that the descent, upon the death of Nancy Smith, is regulated by the first class of cases, under

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which her father, William M. Smith, is entitled to her real estate.

The Chancellor so held, and we affirm his decree as to the land; but we reverse his decree as to the distribution of the personal estate. The cause will be remanded, to be proceeded in according to this decree. The costs of this Court will be paid by complainants.

JACOB ROGERS, in error, v. THOMAS B. MCKENZIE.

1. PROPERTY EXEMPT FROM EXECUTION. *Federal Courts.* Laws of this State exempting property from execution, except such as were passed prior to the U. S. Process Act of 1828, are not operative against executions issued from the United States Courts.
2. SAME. *Same. Horse not.* A horse is not exempt from sale under execution from the Federal Courts.

FROM SULLIVAN.

In the Circuit Court, E. E. GILLENWATERS, J., presiding.

DEADERICK, J., having been of counsel, did not sit in this case.

J. G. DEADERICK, for plaintiff in error, cited Act of 1833, c. 80; 11 Hum., 44; 1 Hum., 390; U. S. Judiciary Act of 1789, § 34; Conkling, 143, 320; 1

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Bright. Dig., 792, § 3, and notes k. l. m; 2 Swan, 358; 1 Head, 17; 9 Hum., 312.

S. T. LOGAN, for defendant, cited *Wayman v. Southard*; 10 Wheat, 1, 49, 50; *Bank of United States v. Halstead*, 10 Wheat, 51; Acts of Cong., 1828 1839, 1841; Acts of Tenn., 1833; C. & N. 535; 1 Paine, 428, 429; 1 Pet. Cir. Ct. R., 1; *Lane v. Townsend*, Ware, R., 286; *Springer v. Foster*, 1 Story's R., 601; *Polk v. Douglas*, 6 Yer., 209; *Ross v. Duval*, 13 Pet., 45.

NICHOLSON, C. J., delivered the opinion of the Court.

An execution issued from the Circuit Court of the United States at Knoxville, and was levied on the only horse of plaintiff. The horse was sold, and bought at the sale, by defendant. Plaintiff sued defendant in replevin for the horse, claiming him as being exempt from execution. The Circuit Judge held that the horse was not exempt from an execution issuing from the Circuit Court of the United States, although he was exempt under the laws of the State. From the judgment in favor of defendant below, plaintiff appeals in error to this Court.

To determine the question raised in this cause, we must ascertain whether there is any statute of Congress or any rule of the Federal Court, under which the horse levied on was exempt from the executions issuing from the Federal Courts. Of course, the exemption laws of the State can not govern the case, unless they have been

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adopted by Act of Congress or some rule of the Federal Courts made in pursuance of law.

The Act of 1789, s. 34, 1 Stat., 81, provides, that "the laws of the several States, except where the Constitution, treaties or statutes of the United States, shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the Courts of the United States, in cases where they apply." In *Wayman v. Southard*, 10 Wheat., 1, it was observed by the Court, that the laws of the several States were, by the Judiciary Act of 1789, s. 34, to be regarded as rules of decision in trials at common law, in cases where they apply, unless the Constitution, treaties or statutes of the United States, had otherwise provided. This, however, did not apply to the practice of the Federal Courts. As to that, the laws of the States were no rule of decision; and the direction was intended only as a legislative recognition of the principles of universal jurisprudence as to the operation of the *lex loci* in the trial and decision of causes. It relates to the rules for framing, not for executing, the judgment. It has nothing to do with the proceedings after payment; it means only that the judgment shall be rendered according to the laws of the State. See Kent's Com., Vol. 1, 394; Brightly's Dig., 792, note K. The question before us is, therefore, not governed by the Act of 1789, s. 34.

By the process Act of 1792, s. 1, as amended by the Act of 1828, s. 3, it is provided, that "writs of execution and other final process, issued on judgment and decrees rendered in any of the courts of the United States, and the *proceedings thereon*, shall be the same, except

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their style, in each State respectively as are *now* used in the courts of each State, &c.; *provided*, it shall be in the discretion of the Federal Courts, by rules of court, so far to alter final process in said courts, as to conform the same to any charge which may be adopted by the Legislatures of the respective States for the State Courts."

This Act of Congress applies in its very terms only to State laws then existing. *Catherwood v. Gossett*, 2 Curt., C. C., 94. It adopts as part of the proceedings on executions, the rights secured by the then existing laws of the State, to one imprisoned, to have the privilege of the jail limits. *United States v. Knight*, 14 Pet., 301. And the forthcoming bond in Mississippi is part of the proceedings upon the final process hereby adopted. *Amis v. Smith*, 16 Pet., 303. Upon the same mode of construing the Act of 1828, as to proceedings on final process, the proceedings in the courts of Tennessee, at that time, upon final process from the courts of the State, were, by that Act of Congress, adopted; and as final process could, at that time, under the laws of Tennessee, be levied on the only horse of a debtor, and no subsequent Act of Congress having been passed, and no rule of the Federal Court to the contrary having been adopted, it follows that the levy of the execution in the case before us was legal, and that the purchaser at the Marshal's sale got a good title.

The judgment, therefore, is affirmed.

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MARY R. PARKER, in error, v. COWAN & DICKINSON.

1. HUSBAND AND WIFE. *Merger. Ratification.* Husband and wife executed a joint note for a debt of the wife, contracted before marriage, the husband dying, the wife promised to pay the note, held that the note did not extinguish the original debt, and that though not obligatory on the wife during coverture, yet it was capable of ratification, and it was ratified by the promise made after she became discoverd.
2. CONSIDERATION. *Moral obligation.* A promise to pay may be supported by a moral obligation, when the obligation grows out of an original legal obligation which has been extinguished without being performed.

FROM MONROE.

In the Circuit Court, before E. T. HALL, J.

W. J. HICKS, for the plaintiff in error, cited, Chit. on Contr., 48, 49; *Sheppard v. Kindle*, 3 Hum., 80; Bac. Abr. Baron & Feme H., 296. On confirmation; *Maney v. Porter*, 3 Hum., 347, 366; Bouv. Law Dict., Confirmation 1 and 5. *Cherry v. Newsom*, 3 Yer., 370-1.

E. W. CROZIER, with him, cited 1 Par. on Contr., 26, 345, 361-2, and n. 3, *Ib.*, 20, 21; *Hughes v. Peters*, 1 Cold., 69; *Bailey v. Freeman*, 11 J. R., 221; *Gilman v. Kibler*, 5 Hum., 19; *McGhee v. Lynch*, 3 Hay, 105; Story on Contr., 435.

T. R. CORNICK, for defendants, cited *Litton v. Baldwin*, 8 Hum., 214, which he distinguished from this

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case, 1 Chit. Pl., 59; 1 Wheat. Selw., 268; *Alder v. Buckley*, 1 Swan, 72. On confirmation, *Fitzpatrick v. School Commissioners*, 7 Hum., 224; *Jones v. Hamlet*, 2 Sneed, 256.

NICHOLSON, C. J., delivered the opinion of the Court.

Plaintiff in error, whilst a *feme sole*, bought goods, wares and merchandise, of defendants in error, to the amount of \$1,232. She afterward married, and in settlement of said account, her husband and herself executed their joint note to defendants in error, for the amount of the account. Soon after the death of Wm. Parker, her husband, the attorney of defendants in error, called on plaintiff in error, and presented to her the note and account, and requested payment. "She replied that she could not pay the debt just then but said it was a just debt, and she did not intend that the estate of her late husband, William Parker, should pay any part of the debt, as it was her debt that she made before she married him. She said that she would pay the claim, and asked indulgence for a short time, which witness promised to give and did give."

Upon the failure to pay, suit was brought against her in the Circuit Court of Monroe county. The declaration contained two counts—one on the account, and the other on the note. The plaintiff in error put in the plea of *nil debit*, and several special pleas, to the effect that she was not liable on the account, because it was extinguished by the note, and not liable on the note, because she was a *feme covert* when it was exe-

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cuted. To these pleas there were replications and issues joined.

The jury found a verdict in favor of defendants in error on the second count of the declaration, which was on the note; and upon the Court discharging a rule for a new trial, plaintiff in error appealed in error to this Court.

When the Circuit Judge came to charge the jury, he was requested by the plaintiff in error to withdraw from them the evidence before detailed, as to the promises by plaintiff in error to pay the debt soon, and her request for indulgence. The Judge refused to withdraw the evidence; and his refusal to do so is the error now relied on for a reversal of the judgment.

The first question to be decided is, what was the legal effect of the execution of the note by complainant and her husband, on the account made by complainant before her marriage? Was it an absolute extinguishment and satisfaction of the prior indebtedness resting upon the account? In Chitty on Bills, 172, it is said: "A person, by taking a bill of exchange or promissory note, in satisfaction of a former simple contract debt, or of a simple contract debt created at the time, *suspends his remedy*, and is precluded from afterwards waiving it, and suing the person who gave it to him for the original debt, before the bill has been dishonored; for the taking of the bill is *prima facie* a satisfaction of the debt, and, at least, amounts to an agreement to give the person delivering it credit for the length of time it has to run." In *Robinson v. Branch*, 3 Sneed, 506, it was held that "the execution of a note, under seal, is *prima*

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facie evidence of a settlement of all pre-existing accounts between the parties, and casts the burden of proof upon the party asserting otherwise." It follows that the execution of the note by complainant and her husband, was not an absolute extinguishment and satisfaction of the original debt. It was a suspension of the right to sue on the original debt until the note was dishonored; and it was *prima facie* evidence that the account was settled and satisfied.

The next question is as to the legal effect of the execution of the note by complainant, she being at the time a *feme covert*. With certain exceptions, a married woman is incapable of entering into any contract so as to bind herself personally, or of suing or being sued in her own name, during her coverture.

By the execution of the note, therefore, she incurred no liability to be sued. But it does not follow that the original debt was thereby in any way affected. By her marriage the law suspended the right of her creditor to enforce his claim by suit against her; he could only enforce the claim by suit against her husband. The giving of the note by the husband had no other effect on the original debt, as we have seen, than to suspend the right of the defendant in error to sue, except upon the note, until payment thereof was refused. After payment of the note was refused, suit could be brought against the husband on either the note or the account; but during the coverture, suit could be brought against the wife alone upon neither the note nor the account. This was the legal consequence of her being a married woman. But whilst the note, during the coverture, cre-

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ated no obligation upon her, yet it cannot properly be said to be a contract *void ab initio*, as it would have been if given for a debt created during the coverture. Having been given for a legal liability existing before her marriage, the note can only be regarded as a nullity and as having no obligatory force during the coverture, and not after she became discover, unless so ratified as to revive the original liability.

The next question is, as to the legal effect of the promise made by plaintiff in error after she became discover. It must be conceded that she was then under no legal obligation to pay the note. As the jury found by their verdict that she was liable on the account, and as we are not called on to determine whether that finding was erroneous or not, we need not express any opinion on that point. But as the jury found that the plaintiff in error was liable on the note, and as this finding was manifestly based upon the evidence of her promise to pay, the question is presented, was the Circuit Judge in error in refusing to exclude that evidence from the jury?

It is well settled that "a moral obligation is not alone a sufficient legal consideration to support either an express or implied promise." 1 Story on Contr., § 465. But this general rule is subject to this exception: "A moral obligation to pay money or to perform a duty is a good consideration for a promise to do so, where there was originally an obligation to pay the money or to do the duty, which was enforceable at law, but for the interference of some rule of law." 1 Parsons on Contr., 361; 1 Story on Contr., § 466.

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If plaintiff in error had been under no previous liability to pay the debt for which the note was given, her simple promise to pay would have created no liability, as it would have been a promise to pay a contract *void ab initio*, and, therefore, not capable of ratification. 1 Story on Contr., § 468. But because she was under a legal obligation, before her marriage, to pay for the goods purchased, when the impediment to the enforcement of that obligation, produced by her marriage, was removed by her becoming discover, this previous legal liability constituted a sufficient moral obligation to support the promise to pay the debt. When the note and account were presented to her, and payment was requested, her promise to pay the debt might well be regarded by the jury as virtually a re-delivery, as well as a ratification of the note; and being under a moral obligation to pay, as she freely acknowledged, the verdict of the jury was well supported by the proof.

There was, therefore, no error in the refusal of the Circuit Judge to exclude from the jury the evidence of the promise by plaintiff in error to pay the debt, and we affirm the judgment.

Hiram Herd, Adm'r, &c., v. Wm. N. Bewley *et als.*

HIRAM HERD, Adm'r of JESSE HERD, dec'd, v. WM.
N. BEWLEY *et als.*

1. EQUITY PLEADING. *Bill to execute decrees.* A bill to carry out the purposes of the original bill, on a decree obtained upon it, must be filed as an amended and supplemental bill.
2. SAME. *Bill to attack or modify.* To attack decrees or modify their operation, or show errors in them, the proceeding cannot be by original bill, where prosecuted by a party to the cause. It must be by rehearing, writ of error *coram nobis*, bill of review, appeal, or writ of error.
3. SAME. *Consolidated causes.* Where causes are consolidated, the parties are subject to this rule.

FROM HANCOCK.

In the Chancery Court at Sneedville, _____
presiding.

W. R. EVANS, for complainant.

J. T. SHIELDS, for defendants.

NELSON, J., delivered the opinion of the Court.

The demurrer in this case to complainant's bill, was properly allowed by the Chancellor.

The bill alleges that complainant's intestate having conveyed his lands in fraud of his creditors, and his estate being insolvent, complainant filed a bill to set aside his fraudulent deeds; that bills were filed by the creditors of the intestate and others, to attach his interest in the land; that a decree for its sale was pronounced on

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the bill brought by complainant; that John A. Herd, one of the purchasers at the sale, failed to pay the purchase money of the tract purchased by him, and it was re-sold; that William C. Baldwin, the purchaser of part of the lands, paid a considerable part of the purchase money to Wm. McNeil, former Clerk and Master, of whom complainant and others were securities; that the securities were brought before the Court, and at March Term, 1868, the cases were consolidated, and a decree pronounced in favor of W. N. Bewley, one of the complainants in the consolidated causes, for \$800; that numerous debts are still unpaid, and the whole, or the greater part, of the proceeds of the sales of the land will be required to pay the debts and charges; that said McNeil, when he received the money, should have paid off said debts and the liabilities; that an execution was awarded in favor of said Bewley, against complainant and the other securities of McNeil, who is not a creditor of the intestate, and whose action will have the effect to postpone other creditors.

Injunctions were prayed for and obtained against C. C. Miller and W. N. Bewley, two of the creditors, who had obtained decrees, to restrain them from collecting the moneys due from McNeil's securities, and also against the Clerk and Master, to prohibit him from issuing executions against them.

There is some obscurity in the allegations of the bill, and neither the original bill previously filed by complainants, nor the consolidated causes, are made parts of the record, nor are they before us in any other way than by the statements of the present bill.

 William Powell v. Henry Cyfers.

If this bill was filed to carry out the purposes of the original bill, it should have been filed as an amended and supplemental bill. If its object is, as it seems to be, to attack or postpone the decrees in favor of Miller and Bewley, and to show that there were errors in the decrees in their favor, we hold that this cannot be done by original bill. It could only be done by petition for re-hearing filed within the proper time, by writ of error *coram nobis*, by bill of review, or by writ of error, or appeal to this Court. No fraud is charged upon Miller and Bewley in obtaining their decrees, and the bill seems to have been filed more for delay than for any other purpose.

Affirm the Chancellor's decree.

 WILLIAM POWELL v. HENRY CYFERS.

BILL FOR NEW TRIAL. *Excuse for not defending.* A bill in equity to obtain a new trial at law, which alleges that the complainant (defendant at law) was prevented by threats of personal violence from attending the court at the time of trial, not stating that the threats were made by the defendant, or that he had anything to do with them, and without showing that the complainant could not have defended by attorney or agent, does not make a case for relief.

Case cited and approved, *Seay & Sheppard v. Hughes*, 5 Sneed, 155.

 FROM HAWKINS.

From the Chancery Court at Rogersville, S. J. W. LUCKY, Ch., on the hearing, dismissed the bill.

William Powell v. Henry Cyfers.

R. M. BARTON and F. M. FULKERSON, for complainants.

JAS. T. SHIELDS, for defendants, cited *Kearney v. mith*, 3 Yer., 127, 133; 1 Meigs' Dig., p. 173.

NICHOLSON, C. J., delivered the opinion of the Court.

This is an application to the Chancellor to vacate a judgment at law, and to give to the complainant a new trial in the Circuit Court. This kind of relief has occasionally been granted by the Chancery Courts, but such exercises of its jurisdiction are of rare occurrence, and when granted, must be based upon clear proof of fraud on the part of the successful party at law, or of unavoidable accident, unmixed with negligence on the part of the unsuccessful party or his agent. *Seay & Sheppard v. Hughes*, 5 Sneed, 155.

The allegation in this case is, that complainant did not make his defense, because he was prevented by threats of personal violence from attending the Court at the time of trial. It is not alleged that he was prevented from making his defense by the threats of defendant, or that defendant was in anywise responsible for the danger to which he alleges he would have been exposed in attending court. Nor is it alleged or shown by proof, that he could not have made a defense through an agent or attorney at law. We are unable to see any valid ground on which the relief prayed for by complainant can be granted.

The decree of the Chancellor will, therefore, be affirmed.

C. A. Charles v. F. W. Taylor, Adm'r, &c.

CLINTON A. CHARLES v. F. W. TAYLOR, Adm'r, &c.

1. **SALF, REGISTERED.** *Recession not registered. Creditors.* A sale of land being made by deed registered, it was rescinded by title bond to reconvey, unregistered. A creditor of the first vendee levied upon the land as his property. Held, that a bill would not lie by the original vendor to enjoin the sale.
2. **SAME.** *Same. Rights of vendor. Practice. Remand to amend.* The bill being filed against the creditor alone, it was held that he was not affected by equities between the vendor and parties liable with the vendee, on the judgment, and could not be enjoined from proceeding against the land until he had exhausted his remedy against the other parties to his judgment; but the creditor's present right of sale being declared, the cause was remanded to make new parties and adjust equities.

Code construed, 3170.

FROM HAWKINS.

From the Chancery Court at Rogersville. The transcript does not show what Chancellor presided at the hearing.

J. T. SHIELDS, for complainant.

R. M. BARTON and W. MCFARLAND, for defendant.

NICHOLSON, C. J., delivered the opinion of the Court.

This is an appeal from the Chancery Court at Rogersville.

The facts on which the question to be determined arises, are as follows:

On the 31st of August, 1865, Charles sold and con-

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veyed to James White a tract of land for \$5,000, which conveyance was duly registered. Afterwards, to-wit: in the month of November, 1865, the parties rescinded the sale, and White executed to complainant, Charles, an agreement or bond to reconvey the land. This agreement or bond was not registered.

On the 6th of February, 1867, defendant, Taylor, recovered, in the Circuit Court of Hawkins county, a judgment against James White and James L. Price for \$6,212, on a note executed by said White, Price and L. N. Kyle, as principals, and William C. Kyle as surety. At the same time, to-wit: on the 6th of February, 1867, the said Taylor recovered a separate judgment against said William C. Kyle, the security on said note, for the amount of \$6,212.

Execution issued on the first-named judgment, and was levied on the tract of land aforesaid, as the property of James White.

The bill was filed to enjoin the Sheriff, Beal, from selling; and Taylor and Beal are the only parties made defendants.

Defendant Taylor answers, admitting substantially the allegations of the bill. The cause was heard on bill and answer; the injunction was dissolved, and the bill dismissed for want of equity.

It is clear that, as the legal title to the land was in White, it was liable to be levied on and sold, to satisfy the judgment of Taylor. *Green v. Demoss*, 10 Hum., 376; 4 Cold., 315. The Chancellor's decree was, therefore, proper, and is affirmed.

But we are asked to require the plaintiff, in the

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judgments against White, Price and Kyle, to exhaust his executions by resorting to other property of the defendants, before selling the land already levied on as the property of White. This can not be done, as none of the parties to the judgment, except White, are defendants to the bill. But, by the Code, 3170, we are authorized to remand the cause, that justice may be done by making the necessary parties. In view of the peculiar circumstances of the case, we remand it, for such steps in the way of making other parties as may be necessary; but this order will not interfere with the sale of the land, in accordance with the decree below. The costs will be paid by complainant.

GEORGE G. HERD, Administrator of JOSIAH T. DELP,
v. ELI R. DELP *et als.*

1. ADMINISTRATION. *Year's support. Partnership.* On a bill filed by the administrator of a deceased partner to set aside a sale of property claimed by the administrator as the individual property of the intestate, the property was held to belong to the firm, and the sale to be valid, but an account was ordered to ascertain what purchase money was due. The property was attached under the bill, and before replevy a portion of it was set apart for the year's support of the widow of deceased. Held, that the amount taken for year's support was a proper credit to the purchaser, as against the administrator.
2. SAME. *Limitation. Payment.* The purchaser as part of the price, paid a judgment against the deceased partner. Held not to be affected by the statute of limitations, Code, 2874, as to administrators. It was a payment, not a mere debt acquired by the purchaser.

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3. **SAME. Same. Note.** A note held by the purchaser on the deceased, accepted by the surviving partner as part of the price, stands on the same footing.

FROM HAWKINS.

In the Chancery Court, at Rogersville, S. J. W. LUCKY, Ch., presiding.

This was a bill filed in the Chancery Court at Rogersville, 16th November, 1858, to attach 129 hogs, claimed by the complainant, administrator of J. T. Delp, as having belonged to his intestate, who died July, 1858, in his individual right, alleging that they were in the hands of the defendant, E. R. Delp, under color of a purchase from Wm. Delp, who falsely claimed to be a partner of the deceased. The property was attached, and while out of the possession of E. R. Delp, thirteen of the hogs were applied to the year's support of the widow. It appeared in proof that Wm. Delp was a partner, and the sale was held good, but an account was ordered, to ascertain whether E. R. Delp had paid for the hogs, which was taken February 12, 1868. The Clerk and Master allowed a credit for the hogs applied to the year's support. It was shown that Eli R. Delp had paid a judgment against the deceased to one Gillenwaters, for \$81.30, and this was allowed by the Clerk as a credit, it being shown that the payment of the judgment had been accepted by the surviving partner as a part payment on the purchase. E. R. Delp also held a note on the deceased for a balance, which was taken by the surviving partner in part payment of the price, of which note the Clerk and Master allowed as credit

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\$628.56. To these items exception was taken by complainant, that they were barred as claims against the estate of the deceased, being allowed some ten years after the intestate's death, and the qualification of the administrator, in 1858. The Court below, sustained the exception, and the defendant, E. R. Delp, brought the cause to this Court by writ of error.

F. M. FULKERSON, filed a brief for complainant.

JAS. T. SHIELDS, for defendant, E. R. Delp, insisted that there was a total misapplication of the statute of limitation. That these credits were allowed because the first was so much of the property purchased, which had been appropriated by the administrator to the use of the widow, while under his control, during the time the property was under attachment, which had not been returned, and so it was a payment as to them..

The others were payments accepted by the surviving partner, and not debts held by the purchaser against the estate.

DEADERICK, J., delivered the opinion of the Court.

The questions for determination in this case, arise upon exceptions to the Master's report.

A partnership existed between the intestate and his father, Wm. Delp. After the death of the intestate, Wm. Delp, as surviving partner, sold 129 head of hogs belonging to the partnership, to respondent, Eli R. Delp.

This he had a right to do, and the respondent, Eli, acquired a good title to the hogs by virtue of the purchase. There is no proof that the price was inadequate or that there was fraud or unfairness in the transaction.

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Nevertheless, the complainant attached the hogs, alleging in the bill that they belonged to his intestate, and they were replevied by defendant, Eli. A reference to the Master was ordered, to ascertain the state of accounts between the parties. And the Master's report, dated February 12, 1868, shows that the said Eli had paid the price agreed to be given for the hogs, except the sum of \$48, which, with interest thereon to the 1st of March, 1868, showed a balance due complainant of \$75.89 at that date.

The complainant excepted to the three several credits allowed respondent, Eli.

1st. 1,384 pounds pork, at \$6 per hundred, amounting to \$83.04, paid to administrator, and set apart to intestate's widow as part of her year's support.

This exception was sustained by the Court. In this the Chancellor erred. The exception should have been disallowed.

2. Respondent, Eli, paid for intestate a judgment of \$61.30, and also paid to Wm. Delp, the surviving partner at the time of the purchase, \$628.50, in a note, or balance of a note, he, Eli, held on intestate.

These two credits last named, were allowed by the Master, and upon exception taken by complainant, were disallowed. We think they were proper credits to respondent, Eli, and the exceptions to the report were improperly allowed by the Chancellor. This was upon the erroneous supposition of the Chancellor that these several payments, as we regard them, towards the price of the hogs, were outstanding debts against the estate, and were barred by the statute of limitations of two years and six months, in favor of the administrators.

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The decree of the Chancellor will be reversed, and a decree entered in conformity with this opinion; and the costs will be paid by the complainant in this court and in the Chancery Court.

WM. MEEK and ROBERT SIMPSON v. A. MATHIS and E. S. MATHIS, Ex., *et al.*, O. Bill; and A. MATHIS and E. S. MATHIS v. WM. MEEK and ROBT. SIMPSON *et al.*, Cross Bill.

1. APPEAL. *Decree when final.* A decree for the recovery of the amount due upon the foot of a note on file in the case, with a reference to ascertain the amount, is final so far that it cannot be disturbed by the Chancellor of his own motion, or otherwise than by bill of review, after the term at which it was entered.
2. SAME. *Same.* But if, upon the coming in of the account, the Chancellor make another decree, the party injured by the first decree has two years (by leave) to obtain a writ of error, counting from the time of the last decree.
3. SAME. Appellee can not assign errors.
4. INJUNCTION BOND. *Judgment on.* Where an injunction is obtained against one defendant, against whom the suit is successfully prosecuted, another defendant, who has not been enjoined, can not have judgment on the bond.
5. MORTGAGE. *Purchaser with notice. Relief against.* A party who purchases a chattel with notice of a mortgage, and keeps it for years pending the suit, cannot, on a bill to sell the chattel, upon a recovery by the mortgagor, require him to go upon the property for his debt; but the debt, if less than the original value of the chattel, will be decreed against the purchaser.

FROM HAWKINS.

From the Chancery Court at Rogersville, SETH J. W. LUCKY, Ch., presiding.

Meek et al. v. Mathis et al., and Mathis et al. v. Meek et al.

The bill charges that complainants Meek and Simpson, purchased from one Presnell, a portable saw mill; that all the purchase money had been paid but \$75.00, when Presnell left the country; that defendants, Mayes and Barnett, claiming to be creditors of Presnell, had garnishments served on complainants, and that judgment was rendered for more than was due to Presnell; that they appealed; that after this they discovered that Alex. Mathis had a mortgage on the mill, which, if declared a valid lien, will entitle them to abate the price to Presnell. It prays that Barnett and Mayes be enjoined. Mathis answers, and files a cross bill, in which he sets up notice to Meek and Simpson of the mortgage, and judgment *pro confesso* is taken against them. Mathis died pending the suit, and it was revived in the name of the defendants, his executors.

J. T. SHIELDS, for complainant, on appeal. J. B. HEISKELL with him on writ of error.

R. MCFARLAND, for defendants.

NICHOLSON, C. J., delivered the opinion of the Court.

The first question to be decided in this cause is, whether the decree pronounced on the 10th of Sept., 1868, was a final decree, or was it an interlocutory decree. After stating the facts, which appeared to the Chancellor to be conclusive of the case, the decree proceeds: "His Honor is therefore pleased to order, adjudge and decree, that the said Alexander Mathis and E.

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Smith Mathis, executors of Alexander Mathis, deceased, recover of the said Wm. Meek and Robt. Simpson, and their security, James T. Shields, the balance of the purchase price of said mills, with interest at six per cent. per annum, until paid; and because it does not appear what sum is still due the complainants in the cross bill, his Honor is further pleased to order, adjudge and decree, that the Master will take an account upon the foot of the notes filed and marked as filed on the 29th of May, 1860, and what balance is due to the complainants in the cross bill, allowing all just credits, and make his report to the next term. And his Honor orders, adjudges and decrees, that the complainants in the original bill, and the defendants in the cross bill, pay all the costs of this cause. And it is further ordered, adjudged and decreed, that the attaching creditors of the said Presnell be perpetually enjoined, and that they pay the costs of their attachment and garnishment."

In the case of *Delap v. Hunter*, 1 Sneed, 101, the Court say: "A decree is final when all the facts and circumstances material and necessary to a complete explanation of matters in litigation are brought before the Court, and so fully and clearly ascertained on both sides that the Court is enabled, upon a full consideration of the case made out, *finally* to determine between them according to equity and good conscience." Barb. Ch. Pr., 330; 8 Wend., 224. "A decree which disposes of the whole merits of the cause, leaving nothing for the future judgment of the Court in the case which will make it necessary to bring it again before the Court for final decision, is a final decree." 8 Paige, 18.

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Commenting on the case of *Jaques v. The M. E. Church*, 17 Johns., 558, in which Judge Spencer said, that "no case can be found in which a decree directing a reference to a Master, or a feigned issue, for the purpose of ascertaining any material fact in the cause, has been held to be a final decree," this Court, in *Delap v. Hunter*, said: "We will not say that a decree may not be final, although it directs a reference to the Master. It may be so when it contains all the consequential directions that may depend on the result of the report, where no further decree of the Court will be necessary in the case."

Upon these authorities, we are constrained to hold, that the decree of September 10th, 1868, was final. All the facts and circumstances material and necessary to a complete explanation of the matter in litigation, were before the Court; and upon these facts and circumstances, the rights of the parties were determined. The costs of the case were disposed of, and nothing left but to ascertain the exact amount of the balance due to complainants in the cross bill, which was merely a matter of clerical calculation. The ascertainment of this balance by the Master rendered no other decree necessary, except the final judgment awarding execution. As soon as it was ascertained and confirmed by the Court, it became the amount for which a decree had already been made. The decree was, therefore, final, and could not be examined by the Chancellor at a subsequent term, and cannot be examined here, as it was not appealed from, and is not here by writ of error.

The next question is as to the correctness of the de-

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cree rendered at a subsequent term on the 5th of March, 1869. In this decree complainants in the cross bill are turned over to the mills for the enforcement of their lien and for the satisfaction of their debt. This is in effect, a reversal and abrogation of the decree of September 10th, 1868, made at a former term.

In the view that the last named decree was final, the decree of March 5th, 1869, was erroneous. The only power that was left to the Chancellor was to pass upon the report of the Clerk and Master. Upon the confirmation of the report the decree of September 10th, 1868, was in a condition to be fully executed by the awarding of an execution. The decree of March 5th, 1869, will be reversed, and the cause remanded.

On a motion for writ of error and petition to rehear, NICHOLSON, C. J., delivered the following opinion of the Court:

At a former day of the term it was held by the Court that the decree made by the Chancellor at the September Term, 1868, settled the rights of the parties, and that at the subsequent term, in March, 1869, when the report of the Clerk and Master on the account ordered, was made, it was not competent for the Chancellor to reverse his decree made at the previous term; that he could do no more than confirm the report of the Clerk and Master, and award execution according to the the decree of the September Term, 1868.

It was also held by this Court, that, as the cause was in this Court by appeal from the decree of March,

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1869, by the complainants in the cross bill only, and as the defendants to the cross bill had taken no appeal or writ of error, the decree of September Term, 1869, was not before us for examination as to errors in that decree.

The defendants in the cross bill who are the complainants in the original bill, now move for a writ of error to bring before us the decree of September Term, 1868, to the end that said decree may be re-examined upon its merits, and if there is error in it, that the same may be corrected.

The writ of error lies to this Court from the Chancery Court within two years after the judgment or decree. If the time is to be computed from the decree of September Term, 1868, the application is too late, and the motion must be disallowed. But if the time is to be computed from the decree at the March Term, 1869, the motion is in time, and must be allowed as a matter of right.

By the Code, 3176, a writ of error lies from the final judgment of the Chancery Court to the Supreme Court, in all cases where an appeal in the nature of a writ of error would have lain.

By section 3172, an appeal in the nature of a writ of error lies at the instance of either party, from the judgment or decree of the Court of Chancery, upon the same terms and subject to the same regulations, as an appeal from similar judgments or decrees.

By section 3155, either party, dissatisfied with the judgment or decree of the Chancery Court, may appeal to the Supreme Court, and have a re-examination in that Court of the whole matter of law and fact, appearing in the record.

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By section 3157, the Chancellor may, in his discretion, allow an appeal from his decree, determining the principles involved, and ordering an account, or a sale, or partition, before the account is taken, or the sale or partition is made.

It is clearly deducible from these several provisions of the Code, that the appeal, or appeal in error, or writ of error, cannot be demanded as a matter of right, until the final judgment or decree is rendered; but, in the discretion of the Chancellor, an appeal or appeal in error, may be allowed after a judgment or decree, which is final, so far as settling the rights of the parties is concerned, but before there is a final judgment or decree upon an account, sale or partition, ordered. In the case before us, at the Sept. Term, 1868, when the rights of the parties were finally settled, and an account ordered to be made to the next term, the parties had no right to demand an appeal or appeal in error, from that decree. An application for such appeal or appeal in error, might or might not have been allowed, in the discretion of the Chancellor.† But at the March Term, 1869, when the final judgment on the report of the Clerk and Master on the account, was made, both parties then had, for the first time, the right to an appeal, or an appeal in error, and both parties had two years from that final judgment within which to have the whole case brought to the Supreme Court by writ of error. We therefore think the motion for writ of error must be granted as a matter of right.

† See *Abbott v. Fagg*, post —; *Harrison v. Farnsworth*, post —.

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Upon examination of the decree of September, 1868, it appears that judgment is rendered in favor of A. Mathis and E. S. Mathis, executors, against William Meek and Robert Simpson and their security, James T. Shields, for the balance of the purchase price of the mills in controversy, with interest at six per cent. until paid. It appears that Shields was the security of William Meek and Robert Simpson, complainants in the original bill, on a bond executed upon the granting of the injunction, enjoining Wayne and Stubblefield from prosecuting certain garnishments against them; but no injunction was prayed for or obtained against A. Mathis and E. S. Mathis, who were also defendants to said original bill. It appears, also, that the injunction was made perpetual against the garnishment of Wayne and Stubblefield, whereby the liability of Shields on the injunction bond was discharged; yet a decree was rendered against him as well as against Meek and Simpson, in favor of A. Mathis and E. S. Mathis. This was clearly erroneous, and is so conceded to be by the counsel of complainants in the cross bill.

It appears that in the progress of the original suit, defendants A. Mathis and E. S. Mathis, as executors of Alexander Mathis, the original defendant, filed their cross bill, making Meek and Simpson, the complainants in the original bill, defendants. They make the answer of Alexander Mathis to the original bill part of their cross bill, in which it is alleged that said Alexander Mathis had a mortgage on the mills, for a balance of the purchase money of \$500, due from Elias Presnell, to whom the mills were sold; that complainants Meek

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and Simpson purchased the mills from Presnell, with knowledge that Alexander Mathis had a lien upon them, and prays that they be decreed to pay to them, as executors, the balance due from Presnell on the mills, and that an account be ordered to ascertain the balance. It appears that Meek and Simpson failed to answer the cross bill, and that it was taken for confessed. It was upon the effect of this *pro confesso* order that the Chancellor proceeded in rendering the decree at the September Term, 1868. Taking the several allegations of the cross bill to be true, as he had a right to do upon the *pro confesso* order, we cannot say that the decree against Meek and Simpson was erroneous. The true relief to which complainants in the cross bill were entitled was, to have the mills sold for the enforcement of their lien; but they sought to hold Meek and Simpson responsible for the balance of the purchase money, and if the mills were of value sufficient to satisfy this balance at the time they came into the possession of Meek and Simpson, we are not prepared to say that there was error in holding them directly responsible for the balance due on the mills. At all events, their failure to defend the cross bill authorized the Chancellor to proceed upon the assumption that they were so liable, and to decree accordingly. Whilst we see much imperfection in the record, and are on that account embarrassed in arriving at the real merits and equity of the case, yet we are satisfied that substantial justice will be done by reversing so much of the decree of September 10, 1868, as gives a decree against James T. Shields, and by affirming so much as holds Meek and Simpson responsi-

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ble for the balance of the purchase money due for the mills, and as orders an account to ascertain the amount of that balance.

We have already determined in the opinion heretofore given, that the decree at the March Term, 1869, was erroneous. We therefore, reverse that decree, and remand the cause, that the decree of September, 1868, as herein modified, may be executed.

The complainants, Meek and Simpson, will pay all the costs in this Court and in the Court below, except the costs arising from the garnishment cases of Wayne and Stubblefield, which will be paid by them.

THE STATE v. JESSE ALDER, JOHN COUCH *et al.*

1. STATE CASES. *Fraudulent conveyance.* Where Courts were created for a "Judicial Criminal District," but "having exclusive jurisdiction of all cases to which the State is a party, or which by the laws now in force, require the services of an Attorney-general," held that this did not confer jurisdiction of a bill in the name of the State, to set aside a fraudulent conveyance made to defeat judgments obtained by the State.
2. SAME. In view of the subject matter, "cases to which the State is a party," means criminal cases.
3. CONSTRUCTION. *Equitable jurisdiction.* This Court is not disposed, by construction, to extend the equitable jurisdiction of courts, other than Chancery Courts.†

† See *Lane v. Marshall*, ante 30.

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4. DISTRICT ATTORNEY. *Powers of. Query.* What are the powers of a District Attorney, to file bills in the name of the State, without express authority?

FROM HANCOCK.

In the Circuit Court. Demurrer to bill for want of jurisdiction.

E. E. GILLENWATERS, J., presiding, allowed the demurrer, and the District Attorney appealed.

Attorney General, HEISKELL, for the State.

R. M. BARTON, for defendants.

NELSON, J., delivered the opinion of the Court.

By the Act of November 26th, 1867, chapter 90, Acts of 1867-8, p. 375, the Thirteenth Chancery Division, the Nineteenth Judicial Circuit, and a Judicial Criminal District were established; the latter created by sections 5 to 11, both inclusive, and composed of Johnson, Carter, and eight other counties. The Act was repealed, so far as it related to the counties of Jefferson, Grainger, Cocke and Claiborne, by the Act of February 25th, 1868, c. 49, Acts of 1867-8, p. 60, and the circuit was composed of Johnson, Carter, Washington, Sullivan, Hawkins, Hancock and Greene counties, though the county of Hancock is not mentioned in the first section of the repealing Act. Section 10 of the Act first recited, provided for the election of Judge of the Criminal Court, on the first Thursday of Feb., 1868, which was changed to the third Thursday of April, 1868, by section 3 of the last named Act,

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which embraces Hancock as one of the counties. On the 2d of September, 1869, a bill was filed in the Criminal Court of Hancock County, in the name of the State of Tennessee, by A. H. Pettibone, her Attorney-general, against the defendants, for the purpose of setting aside various fraudulent conveyances alleged to have been made by each of them, and of obtaining satisfaction of a judgment recovered, on motion, in the name of the State, in said Criminal Court, on the 22d December, 1868, against Jesse Alder, former tax Collector, and John Couch and others, his securities, for \$1,001.35 and costs. On the the 26th August, 1869, a fiat directed to the Clerk of the Criminal Court of Hancock County, was granted by "A. W. Howard, Judge," &c., in which it was directed that process should issue as prayed for in the foregoing bill, "in the nature of an equity proceeding, and without security." Demurrers, for want of jurisdiction, were filed to the bill, on the 18th January, 1870, which seems to have been allowed, on the next day, in the Circuit Court of Hancock County, and the bill was dismissed with costs; and from this decree the Attorney General prayed an appeal to this Court, which was granted.

How the case was transferred from the Criminal to the Circuit Court, or who presided in the latter, does not appear from the transcript; but it may be inferred that the case was transferred to the Circuit Court under the Act of November 5th, 1869, c. 40, s. 167, by which the Act creating the Criminal Court was repealed, and the causes pending in the Criminal Courts transferred to the Circuit Courts of the counties, respectively,

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for trial, and by which it was declared that the records of said Criminal Court shall constitute a part of the records of said Circuit Court.

The matter to be determined, upon the demurrers, is, whether the Criminal or Circuit Courts could entertain jurisdiction of the cause; and we are clearly of opinion that they could not. However vague and indefinite the Act of November 26, 1867, may be in other respects, it is manifest that the intention was to establish a Criminal Court, with exclusive criminal jurisdiction. It is true, that, by section 5, it is directed that courts shall be held, "having exclusive jurisdiction of all cases to which the State is a party, or which, by the laws now in force, require the services of an Attorney General," but in that section the district is styled, "a judicial criminal district; and in section 7 it is made the duty of the Attorney General of the circuit in which any one of the counties may be included, "to attend the sittings of said Criminal Court, and to prosecute the pleas of the State, and to represent her interests"—the pleas of the State, like the pleas of the Crown, ordinarily referring to matters criminal. 4 Black. Com., p. 2, m.

Full power is conferred upon the Criminal Court, by section 8, "to take any forfeiture or any recognizance bond, subpoena, or any action, or any other proceeding of the Circuit Court, which said Circuit Court might have taken had the jurisdiction of such court remained in said Circuit Court;" and this, together with the appointment of jurors in the next section, would seem to indicate that the intention was to confer upon the Criminal Court the same jurisdiction which was entertained

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by the Circuit Courts in criminal causes, and nothing more.

The Circuit Courts were not clothed, at the date of said Act, nor are they now, with any jurisdiction over a chancery case like this; and, as it is to be regretted that all proceedings of an equitable nature are not exclusively confined to the more appropriate jurisdiction of that tribunal, whose peculiar province it is to determine equitable causes, we do not feel disposed, by construction, to extend the jurisdiction of any court of law to cases of purely equitable cognizance. Such jurisdiction, when conferred, must rest upon a clear expression of legislative will, in accordance with the powers conferred by the Constitution.

The expression in the fifth section, "all cases to which the State is a party," means, in view of the subject matter of the Act, criminal causes; and the further expression, "which by the laws now in force require the services of an Attorney General," refers to criminal prosecutions, as we are not aware of any statute conferring upon Attorneys General unlimited power to commence suits, generally in the name of the State, in the Chancery Courts. No such power is conferred in the Code, Pt. 3, Tit. 4, c. 3, pp. 711, 713, defining the duties of District Attorneys. They are there directed to prosecute in behalf of the State, in every case in which the State is a party, or in anywise interested; to move for judgments against Sheriffs, Collectors, Clerks and Justices in certain cases; to prosecute all motions against Tax Collectors, and to prosecute any person violating the revenue laws, and to perform the specified duties; but

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the power to commence suits in Chancery, in the name of the State, is not conferred; and doubts may well be entertained whether this discretionary power is even conferred upon the Attorney General for the State in sections 3952, 3960. The Legislature has frequently instructed the Attorney General to bring particular suits; and this power was exercised in the Act of May, 4, 1865, c. 9, p. 26, in directing suits to be brought against certain parties and their securities; and without determining that the Attorney General for the State, or the District Attorneys General, cannot bring suits, in the name of the State, except where they are expressly authorized by general statute or specific instructions by the Legislature; we think the definition of jurisdiction in the said fifth section is too general and uncertain in its nature to confer Chancery jurisdiction on a Criminal Court. In Dwarris on Statutes, 7 Law Lib., 766, m., it is said that "where a statute directs a penalty to be recovered by action, bill, plaint or information, in any court of record, the courts intended by the statutes, *propter excellentiam*, are the four courts of record at Westminster," and it would seem to follow that, in construing this statute, the Legislature, is to be presumed, in the absence of anything to the contrary, to intend that remedies shall be resorted to in the appropriate tribunals which it has created. See, also, Sedgwick on Stat. and Con. Law, 60.

Affirm the decree.

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J. G. PALMER *et als*. v. J. B. MALONE *et als*.

110 549
110 287

1. JUDGMENT BY MOTION. *Affirmed on error. Bill to set up payments* On a judgment against a purchaser at Chancery sale, without notice, the defendant prosecuted a writ of error, on which the judgment was affirmed. He then filed a bill to set up payments made before judgment. Held to be too late.
2. PAYMENTS. *Right to recover.* It seems that he would be entitled to recover of the parties to whom the payment were made, the amounts paid and not applied by them.
Case explained, *Smith v. Vanbibber*, 1 Swan, 110.

FROM UNION.

In the Chancery Court at Maynardsville, O. P. TEMPLE, Ch., presiding.

J. R. COCKE and W. P. WASHBURN, for complainants, cited *Smith v. Vanbibber*, 1 Swan, 110; *Ridgway v. Bank of Tennessee*, 11 Hum., 523.

BROWN and CORNICK, for respondents, cited Code, 4321, 4233; *Lowe v. Morris*, 4 Sneed, 69; *Overton v. Bigelow*, 10 Yer., 48, 52, 53; *Allen v. Barksdale*, 1 Head, 240; *Earles v. Earles*, 3 Head, 366; *Whitesides v. Latham*, 2 Cold., 93; *Smith v. Deaderick*, 6 Hum., 147.

E. C. CAMP, with them, cited *Smith v. Deaderick*, 6 Hum., 147; *Whitesides v. Latham*, 2 Cold., 91; 3 Yer., 99, 127; 1 Tenn., 513; *Cooke*, 175, 178; 8 Yer., 60, 103; 5 Sneed, 103; 3 East, 351; 4 Yer., 469, 337; 8 Hum., 363; 3 Hum., 559; 1 Heis., Dig., 415 to 417; 3

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Sneed, 221; *Nicholson v. Patterson*, 6 Hum., 394; 3 Cold., 528; *Walker v. Walker*, 4 Cold., 300. .

TURNER, J., delivered the opinion of the Court.

The demurrer should have been sustained and the bill dismissed.

On the 4th day of April, 1859, complainants, with others, executed a note to the Clerk of the Circuit Court of Union county, for the sum of six hundred and seventy-six dollars, for the price of a negro slave, sold under a decree of that court, in a proceeding for the sale of slaves for distribution.

On the 2d of October, 1860, the Clerk, to whom the note was given, having gone out of office, his successor was ordered to report instanter as to the amount due on said note. He reported the entire amount of the note due and unpaid. The report was confirmed and judgment rendered for the entire amount of the note, with interest, making seven hundred and thirty-six dollars and eighty-four cents. The motion was made without notice to the complainants.

Complainants, as soon as they were informed of the facts, presented a writ of error to this Court, when the judgment of the Circuit Court was affirmed. Then they filed a bill in the Chancery Court of Union County, seeking to enjoin an execution from this Court, issued for the collection of the judgment above mentioned, alleging that they had no notice of the proceeding in the Circuit Court, at the time of the rendition of the judgment upon motion; that they presented a writ of

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error as soon as a knowledge of the facts came to them, also that they, or some of them, had paid to J. B. Malone, one of the parties interested in the price to be paid for the slave, on the 30th day of August, 1860, eighty-seven dollars and eighty-eight cents, in part of said note, and took his receipt. On the 4th of July, 1859, they paid to Allen Hurst, then Clerk, two hundred and twenty dollars and forty-five cents, and took his receipt, and some time subsequent, paid to Hurst, sixty-six dollars, which Hurst entered as a credit upon the note. That at the time of the report, the Clerk did not have the note before him. It was then, and still is, out of the record, having been lost or carried out by Hurst. All these payments were made before the rendition of the judgment by the Circuit Court; and the bill prays to have them credited on the judgment of affirmance by this Court. The Chancellor granted the relief and ordered an account to ascertain the amount of the several payments. The cause is here by appeal. It is not pretended that these facts were before this Court by the writ of error prosecuted from the judgment of the Circuit Court. It is shown by the allegations of the bill, that, at the time complainants brought the proceeding to this Court by writ of error, they knew of the concealment of the payments, and that they had not been allowed as credits upon the note and judgment. Then they could and should have availed themselves of these facts, in a Court of competent and original jurisdiction. At no time could the defenses have been available in this Court by appeal or writ of error from

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the judgment of the Court below. To have made this so, the Court would have had to have gone outside the record, and to have exercised original jurisdiction.

Although the payments may have been fraudulently concealed at the rendering of the judgment by the Circuit Court, the fact that complainants did not, upon its discovery, avail themselves of it, is negligence in them, and a Court of Chancery cannot now relieve them. This holding is not in conflict with the case of *Smith v. Vanbibber*, 1 Swan, 110. In that case, judgment was rendered, on motion, by this Court, against a Sheriff, for failing to return an execution issued from this Court. The judgment was for the entire amount of costs of the Circuit and Supreme Courts. The Sheriff had no notice of the motion, and there had been, before judgment, payments made to the parties entitled, to a considerable amount, for which payments the Sheriff was not credited in the judgment. The fraud in the concealment of payments from the Court was practiced in this Court. In the opinion in that case, Judge Totten says: "When the execution proceeds from the Supreme Court, it having no original jurisdiction, after the judgments on motion, to hear and determine the facts in question, the Sheriff should have relief in equity, by injunction to the extent of the payments actually made."

In that case, the Sheriff could not have availed himself of the payments to which he was entitled as credits, being prevented by fraud, unmixed with fault or negligence, on his part. In this case, the judgment did not proceed from the Supreme Court, and the grounds of relief existing in *Smith v. Vanbibber* are not here.

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This is not, as insisted in argument, a case of a right without remedy unless the parties are relieved in this suit. They have still a right of action at law against the parties to whom they may have paid, on account of the note, money which was not applied.

The decree of the Chancellor is reversed, the demurrer allowed, and the bill dismissed.

G. W. VITTETO, Adm'r, &c., v. LEWIS ATKINS *et als.*

WILL. Construction. Rest of land not deeded. A testator died possessed of five tracts of land, one of which he devised to his wife during life or widowhood, disposing of the fee in the land after her death or marriage. He had given away, by deed, one tract of land, before he made his will, to two daughters and a grand-daughter. He devised the proceeds of the *rest of his land not deeded away*. He then gave to a grand-son one of his tracts, by sufficient description. The grand-son died in his life time without issue. He also, after some small bequests of personalty, gave the *rest of his personal property, in the house and out of doors*, to his wife, for life or widowhood, and provided that if any property should be left at the death of his wife, it should be equally divided between four sons. He stated in the will, that he had portioned certain daughters, and had given to certain sons, all he intended for them. Held, that the gift to the daughters and grand-daughter, as the *rest of his land not deeded away*, was not intended as residuary, but as designating the specific lands devised; that the lapsed land did not go to them as residuary devisees; that the gift of property to the four sons, if any was left at the death of the widow, was confined to personalty, and that the lapsed land was undisposed of by the will.

FROM GRAINGER.

In the Chancery Court at Rutledge, S. J. W. LUCKY,
Ch., presiding.

G. W. Vitteto, Adm'r, &c., v. Lewis Atkins *et als.*

J. R. COCKE, for complainant.

J. T. SHIELDS, for James Hubbs *et ux.*, Archibald Mullins *et ux.*, and Rachel Hubbs, insisted that the land went to the daughters and grand-daughter, citing Code, 2195; 10 Yerg., 25; 2 Sneed, 387; *Henry v. Hogan*, 4 Hum., 210; 3 Hum., 631; 4 Kent, 537, 542; Broom's Legal Maxims, 133. If the land did not go to these, as residuary devisees, then, as heirs, they took a share, citing 4 Kent, 541; Code, 2432; that the fifth clause only gave the four sons personalty, not realty.

R. M. BARTON, for Robert Atkins, Lewis Atkins, Ira Atkins and Moses B. Atkins, insisted that the land did not go to the daughters and grand-daughter, as residuary devisees, but either passed, under the fifth clause, to the four brothers, or, as to it, the testator died intestate. He cited, Code, 2195; 10 Yerg., 20; 4 Hum., 210; 3 Hum., 631; 2 Hum., 50; 4 Kent, 535, 541.

NICHOLSON, C. J., delivered the opinion of the Court.

The bill in this case was filed in the Chancery Court at Rutledge, for the construction of the will of Lewis Atkins, deceased.

The following are the clauses which we are called upon to construe:

ITEM 3. "I give and bequeath unto my beloved

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wife, Elizabeth Atkins, the following described land, (setting out the boundaries), during her life-time or widowhood; but at her death or intermarriage, then I give and bequeath the above described land to my son, Lewis Atkins, that is to say if he should take care of and maintain me and his mother in our old age; and the rest of my land not deeded away, to be sold on a credit of twelve months, and the money equally divided between Nancy Atkins, now Nancy Mullers, and Elizabeth Hubbs, formerly Atkins, and Rachel Hubbs, formerly Atkins, now deceased, daughter Rachel Hubbs."

4th. "I give and bequeath unto my grand-son, Talbot Atkins, son of Nathan Atkins, a certain tract of land, lying between Ira Atkins, Israel Walter, the top of Coon Ridge, and G. W. Vitteto's line, the whole of it for his part of the land, and he is to have one horse," &c.

5th. "I give and bequeath to my grand-daughter, Lucretia Monroe, formerly Atkins, daughter of Nathan Atkins, one feather-bed, that she claimed when she lived with me, and twenty-five dollars out of my personal property," &c. Touching the rest of my personal property, in the house and out of doors, I give and bequeath it to my beloved wife, Elizabeth Atkins, for her own benefit during her natural life or her widowhood. Should there be any property left at the death of my wife, Elizabeth, then I want it equally divided between Moses B. Atkins, Elijah Atkins, Robert Atkins, and Lewis Atkins, my four sons, as I have portioned off my five daughters in my life-time, namely, Margaret Burnett, formerly Margaret Atkins, Nancy Mullers, formerly

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Nancy Atkins, Elizabeth Hubbs, formerly Elizabeth Atkins, Polly Barrett, formerly Polly Atkins; and that I have lotted to Rachel Hubbs formerly Rachel Atkins daughter for her part in the land I have lotted for sale. I have gave Presly Barrett, Archibald Mullers, James Hubbs, and John Burnett, all that I intend for them."

At the date of the will, and at the death of testator, he was the owner of the tract of land willed to his wife, the tract willed to Talbot Atkins, and two other tracts, one of about sixty acres, and the other about twenty acres. He had previously given, by deed to his grand-son, Ira Atkins, a tract of about sixty acres.

Talbot Atkins, the devisee named in the 4th clause of the will, died without issue, in the life-time of the testator, and the only question for our determination is, what disposition is to be made of the tract of land devised to him? It is our duty to ascertain the intention of the testator as to the disposition of the land, the devise of which lapsed by the death of the devisee, and if we can find out that he intended to dispose of it, in the event of the devisee's death in his own life-time, we are bound to carry out that intention, unless it contravenes some stubborn rule of public policy.

It is insisted for the daughters, that they are entitled to the lapsed devise, as residuary legatees, under the following words in the 3d clause, viz: the rest of my land, not deeded away, to be sold on a credit of twelve months, and the money equally divided between (his daughters). These words were not intended to make the daughters residuary devisees. The testator had deeded one tract of sixty acres to his grandson, Ira

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Atkins, and had two other tracts, one of sixty and the other of twenty acres, which he had not deeded at the date of his will. His intention was to devise these two tracts specifically to his daughters. He says "the rest of my land not deeded away." The use of the word "deeded," fixes his meaning, and shows that he used the words, "the rest of my land," not as residuary words, but to designate the specific share of his daughters in his land.

For the four sons, it is insisted that they are residuary legatees, and as such, entitled to the lapsed devise. Their claim is based upon the language in the 5th clause, viz: "should there be any property at the death of my wife, then I want it equally divided between" (his four sons). The property here referred to, is the personal property, which he had given to his wife, during her life. Of all the personal property that might be left, at his wife's death, he intended his four sons to be residuary legatees; but they have no claim under this clause to the lapsed devise as residuary legatees.

It is apparent that the testator, when he prepared his will, did not anticipate the death of Talbot in his own life-time, and, therefore, made no provision for that contingency, and died without making any other disposition of the land devised to him. As to this land, he died intestate, and the law distributes it amongst his several heirs, according to the statutes of descent and distribution, the devisee having died without issue.

The decree of the Chancellor will be reversed and the cause remanded, to be proceeded in as herein decreed.

The costs of this court will be paid by the complainants out of the assets of the estate.

Hannah A. McBee v. Adam H. McBee.

HANNAH A. MCBEE v. ADAM H. MCBEE.

1. WRIT OF ERROR. *Lies from decree for alimony.* A writ of error lies from a decree for alimony, incident to a divorce, though the decree as to the divorce cannot be reviewed in such proceeding.*
2. SAME. *Notice.* Notice of writ of error is waived by appearance, and moving to dismiss for want of notice.
3. DECREE OF SALE. *To bar redemption.* To bar the right of redemption, under the Code, 2124 and 4489, it is not sufficient that the sale be made on a credit. It must appear that, upon application of a complainant, the sale was so ordered. But a statement in the decree that, at "the special instance and request of the complainant, the said land shall be sold without the equity of redemption," is sufficient.
4. SAME. *Same.* To require the payment of a material proportion of the value of the land in cash, and decree the sale to be without equity of redemption, is error.
5. SAME. *Same.* It may be that a sum may be required to be paid down, to cover the costs and counsel fees, without affecting the decree, in cases where both parties are represented by counsel, and the assent of the debtor's counsel might be presumed, or where it appears that the amount is not such as to affect the price.
6. REVERSAL. *Purchaser. How affected.* A decree under which a sale has been made will be reversed, if erroneous, leaving the parties to settle their rights under the Code, 3186, which provides that a reversal on a writ of error shall not affect the rights of purchasers, acquired before the writ was granted.

FROM JEFFERSON.

In the Chancery Court at Dandridge, SETH J. W. LUCKY, Ch., presiding.

MEEK & GRATZ, for complainants, cited Code, 3183, as to notice of writ of error; Code, 3158, and *Owens v.*

*A bill to vacate or modify a decree for alimony, may be revived after the death of the complainant in the bill of review. See *McCollum v. McCollum*, post 565, bottom of page.

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Sims, 3 Col., 544, as to divorce; Code, 4489, 3534 and 3186; 1835, c. 20, s. 16; *Lewis v. Baker*, 1 Head, 386; *McGavock v. Bell*, 3 Col., 512, as to purchaser's right; *Pryor v. Conner*, MS., that a payment of \$100 required, was not error in a decree barring redemption.

J. R. COCKE & HENDERSON, for defendants, insisted that *Parmenter v. Parmenter*, and Code, 3158, did not preclude relief as to the decree for alimony, and cited Dwarris on Stat., 40. On the decree to bar redemption, they cited Code, 2124, sub. sec. 2.

NICHOLSON, C. J., delivered the opinion of the Court.

Complainant filed her bill for divorce and alimony, against defendant, on the 7th of November, 1864. Defendant being a non-resident, publication was made, and upon his failure to appear and defend, at the June Term, 1865, of the Chancery Court at Dandridge, judgment *pro confesso* was taken, and the cause set for hearing. The cause was heard at the same term, when a decree was made, dissolving the bonds of matrimony. It appearing to the Court that complainant prayed for alimony, and that to secure this, complainant had procured a tract of land, of about 230 acres, belonging to defendant, to be attached; and the Chancellor, being of opinion that she was entitled to alimony, ordered the Clerk and Master to report what amount would be proper as alimony, and, also, what would be a reasonable compensation to her solicitor.

The Clerk and Master reported that two thousand dollars would be a reasonable allowance as alimony, and that two hundred dollars would be reasonable compen-

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sation to her solicitor. This report was confirmed, and the land attached was decreed to be sold. The following is the decree: "That the tract of land mentioned in the pleadings, so attached, be sold in satisfaction of the aforesaid sum of money, and the costs of the suit; and that the Clerk and Master, after giving thirty days' notice, will proceed to sell said land to the highest bidder, on a credit of six months, taking bond and security, and retaining a lien until the purchase money is paid, with the exception of the sum of four hundred dollars, which the Clerk and Master shall require to be paid cash in hand on the day of sale; and out of the proceeds of sale, the Clerk and Master shall first pay the costs of this suit, the solicitor's fee, and the sum of two thousand dollars to the complainant, as her alimony, &c.; and at the special instance and request of complainant, the said land shall be sold without the equity of redemption."

The land was sold in August, 1865, when it was bid off by a purchaser at two thousand five hundred dollars, of which four hundred dollars was paid in cash, and a note given for the residue, payable at six months. At the December Term, 1865, the sale was confirmed, and the title divested and vested.

On the 30th of August, 1867, defendant petitioned one of the Supreme Judges for a writ of error, which was granted.

It is now moved to dismiss the writ of error, on two grounds: first, because the five days' notice of the application for writ of error was not given; and second, because by section 3158 of the Code, divorce cases can be revised only by appeal.

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The answer to the first reason is, that complainant has waived the necessity for notice by appearing—thus answering the object of notice.

The answer to the second reason is, that the bill is not only a divorce bill, but also a bill for alimony. Whilst it is true that errors in divorce cases can only be revised upon appeal, it does not follow that errors in a bill for alimony, as well as divorce, may not be revised by writ of error. The reasons for excepting divorce cases from the general provision allowing writs of error, are special, and have no application to decrees for alimony. Nor is there any necessary connection between divorce and alimony; a divorce may be granted without alimony, and alimony may be granted when no divorce is decreed. Code, 2468. Looking to the intention of the Legislature as our guide, we are satisfied that it was not intended to prohibit writs of error in cases of alimony. Whilst, therefore, any error in this case, as to the divorce, cannot be revised by this court, if there are errors in the decree, as to alimony, they are subject to revision by writ of error. In this conclusion, we are not in conflict with the cases of *Parmenter v. Parmenter*, 3 Head, 225, and *Owens v. Sims*, 3 Cold., 544.

An examination of the record discloses much irregularity and disregard of the rules of Chancery proceedings, in the ascertainment of a reasonable amount to be allowed for alimony, and as compensation to complainant's solicitor; but as we do not see that either allowance is unreasonable, or that injustice was done to defendant, we refrain from commenting upon these irregularities. The objection to the decree mainly relied on

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by defendant's counsel, is, that the Chancellor decreed the land to be sold for four hundred dollars in cash, and the residue on a credit of six months; and, at the special instance and request of the complainant, ordered the sale to take place without the equity of redemption. We are aware of no reported case in which the question now raised, has been determined. We must be governed, then, by a fair construction of those provisions of the Code, which secure to the debtor or owner of the land sold, the right of re-purchase or redemption, and of those which authorize the Court to decree sales free from this right of re-purchase or redemption.

The general law is, that all real estate sold under execution, or under a decree, judgment or order of any Court of Chancery, whether founded on a foreclosure of a mortgage, or deed of trust, or otherwise, shall be redeemable at any time within two years after such sale. Code, 2124. By this general law the right of redemption is secured, whether the sale be for cash or on a credit. But this right of redemption is subject to this exception: When, upon application of a complainant, the Court orders that the property be sold on a credit of not less than six months nor more than two years, upon confirmation thereof by the Court, no right of redemption or re-purchase shall exist in the debtor or his creditor, but the title of the purchaser shall be absolute. In such case no right of redemption or of re-purchase exists. Code, 2124 and 4489. By this exception, the complainant may, with the assent of the Court, deprive the debtor of the benefit of redemption secured to him by the general law. In the case of *Burrow v. Henson*,

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2 Sneed, 658, this Court said, that to obtain the benefit of the exception and destroy the right of redemption, the sale must be brought strictly within its provisions. Two things, therefore, must appear distinctly in the decree to make it operative in destroying the right of redemption. First, it must appear that complainant made the application for a sale on credit. It is not sufficient that the Chancellor, of his own motion, ordered the sale on a credit. It must appear that he was moved to do so upon the application of complainant. Such was the holding of the Court in *Burrow v. Henson*, just referred to. In that case there was no order that the land be sold free from redemption. In the case before us, it is not stated that the Chancellor, upon the application of complainant, ordered the land to be sold on a credit of six months; but at the conclusion of the decree it is stated, that at the special instance and request of the complainant the said land shall be sold without the equity of redemption. This, we think, was a substantial compliance with the requisites of the exception, and that in this respect the decree was not erroneous.

The decree directs the Clerk and Master to sell the land on a credit of six months, except as to four hundred dollars, which he is directed to require in cash. Was the order to require four hundred dollars in cash such a compliance with the law as to defeat the debtor of his right to redeem? By the letter of the law, the sale of the land must be on a credit, otherwise the right of redemption survives. It is said that this court, in an unreported case, held that the requirement of \$100 in cash, to pay costs, was not such a sum as

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would open the right of redemption. Without having seen the case, we presume there was enough in the record to satisfy the Court, that the sale was substantially in compliance with the law, and that the debtor had no reasonable cause of complaint.

We are not prepared to hold, that, where both parties have been represented in the Court below, and when it may be fairly inferred, either that the decree was assented to by the debtor's counsel, or that the amount of cash sale did not probably diminish the aggregate amount of the bidding, such sale is not substantially in conformity to the requisitions of the law. When the Chancellor can see, either from his knowledge of the facts contained in the record, or by the admission of counsel representing the owner of the land to be sold, that the requiring of an amount in cash sufficient to cover costs and counsel fees, will not interfere with the obtaining of a full and fair price for the land, we should consider it sticking in the bark to hold such sale was not, in substance, a sale on credit. But the record here, presents a very different state of facts. The land is shown, by one witness, to have been worth \$3,000, and by another, \$4,000; the Clerk and Master's estimate was, that it was worth \$3,500. Upon a credit of six months, \$400 being required in cash, it brought \$2,500. The defendant was a non-resident, and not represented by counsel. Under such circumstances, we are so far from being satisfied that a full and fair price was obtained, we are strongly impressed with the belief that the land was sold at a sacrifice, and we can not see, but that the

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amount of the cash required, may have contributed to the sacrifice. Besides, we can see no apparent necessity for requiring such an amount in cash, nor for limiting the credit to so short a time as six months. Both the letter and the spirit of the law were violated.

So much of the decree, therefore, as directed the land to be sold without the equity of redemption, was erroneous, and the right to redeem or to re-purchase, was not thereby cut off and destroyed. To this extent the decree is reversed, and in all other respects it is affirmed.

Our attention has been called to the Code, 3186, which provides that the right, title and interest of any such purchaser, acquired under the judgment or decree, before the writ of error and *supersedeas* was granted, shall not be disturbed or affected by the reversal of such decree. Whether our reversal of the decree shall in any way, disturb or affect the right, title and interest of the purchaser of the land, is not a question for our adjudication, on this record. The defendant has a right to have the errors in a decree revised, but whether their revisal will avail him any thing, is in no way involved in our inquiries.

The decree will be reversed, as herein indicated, but as our action here renders no further proceedings necessary in the Court below, the cause will not be remanded. The costs of this writ of error will be paid by the complainant.

*This case was cited in the case of John McCollum v. Rhoda McCollum, Nashville, January 14, 1871. The defendant, Rhoda McCollum, had filed her bill against her husband, the complainant, as a non-resident, on the

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ground, amongst others, of abandonment for more than two years, and alleging a removal of himself and a large portion of his property from the State. On this bill she had obtained a decree for divorce and alimony, by which all the property left by the defendant in Tennessee was vested in the wife. The present bill was filed by John McCollum within three years from that decree, to review and vacate it so far as it related to the alimony. The lands decreed to the wife were held under a deed executed during coverture by five tenants in common with the wife, she having one-sixth in her own right. The deed was made to the husband and wife jointly.

It appears in the record that when complainant abandoned his wife, he took with him a considerable amount in money, which fact was stated by the Chief Justice in connection with the third resolution in the opinion.

Pending the bill of review, the Court below made several orders, requiring the defendant, Rhoda, to pay specific sums to the complainant by a certain day.

The decree below was, that the "decree so far as it divests the title of John McCollum in the land, negro, and other property of him, and vests the same in Rhoda McCollum, be set aside; and said cause, as to the proper amount of alimony, is now open for a re-hearing." A reference was made to the Clerk to ascertain the proper amount of alimony, on which was a report and final decree. This decree gave to the wife the interest which she had held anterior to the joint deed to the husband and wife, and one-half of the remaining part of the land. To the husband it gave also half of the remaining part of the land, and one-half of the personal property left by the husband with the wife when he abandoned her. From this decree the defendant, Rhoda, appealed, and pending the appeal complainant died, and this suit was revived, at the instance of his administrator, in the name of the administrator.

J. W. NEWMAN and J. P. DISMUKES, for complainant. WM. F. KERCHEVAL, for defendant.

NICHOLSON, C. J., delivered the opinion of the Court.

1. The death of complainant does not have the effect of abating either the appeal or the suit. In this respect an appeal from a decree of divorce differs from a decree for alimony. *McBee v. McBee*, 1 Heiskell, 558. The revivor, therefore, in the name of complainant's administrator, was proper.

2. By the death of complainant, the title to the 200 acres of land survived to defendant. The decree, therefore, giving him one-half the land ceases to be operative, and the title to the entire tract is vested in defendant.

3. It was not reasonable to allow complainant one-half of the value of the personal goods and chattels left with his wife when he abandoned her. The proof shows that his object in leaving her was to reduce her to hardship and trouble. He left with her no more than was necessary to keep her from want. Besides, by interlocutory decrees, she was required to make cash provision, for several years, for his support. In regard to the half of the value of the personal property, this decree is reversed.

Defendant will pay the costs of this Court, and of the Court below.

Richard Hale v. George W. Witt.

RICHARD HALE v. GEORGE W. WITT.

RESCISSION CONTRACT. *For failure to perform.* In 1849, Witt, by writing, signed by both parties, agreed, with his grand-father, Hale, to live with him and his wife during their natural lives; to take good care of them; furnish them all the necessaries of life; to be good and obedient to them, as a son to his father and mother. Hale agreed to give Witt, on his, Hale's death, a tract of land, described in the writing. In 1854, another writing was entered into, defining more fully, in some particulars, the duties, rights and obligations of each. In 1856, this bill was filed by Hale to rescind the contract, on the ground of failure on the part of Witt to perform his undertakings, and charging many acts of gross misconduct on the part of Witt. Held that the bill did not make a case for rescinding the contracts, but that an account should be decreed in favor of complainant for all outlay incurred by him, on account of failures on the part of Witt to provide for him and his wife, and to perform his contract.

FROM JEFFERSON.

From the Chancery Court at Dandridge, SETH J. W. LUCKY, presiding.

A. CALDWELL, for plaintiff.

R. MCFARLAND, for defendant.

TURNEY, J., delivered the opinion of the Court.

The decree of the Chancellor rescinding the contracts, one of the 20th day of August, 1849, and the other of the 21st day of July, 1854, is erroneous.

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The first is in these words: "Know all men by these presents, that I, Richard Hale, of the county of Jefferson, and State of Tennessee, of the one part, and G. Washington Witt, and Samuel H. Witt, the father of George W. Witt, being present, and agrees that the said G. W. Witt may act as though he was of lawful age, of the other part, doth bind themselves in the penal sum of two thousand dollars, mutually to each other, to stand to the condition of the agreement undersigned, for which we bind ourselves and executors, and administrators, in witness, our hands and seals, &c.

"The condition of the above is such, that the above bound George W. Witt hath agreed to live with the said Richard Hale and Margaret Hale, his wife, during their natural lives, and take good care of them, and furnish them in all the necessaries of life, suitable to their age, both in health or in sickness, and be good and obedient to them in all things, so far as is lawful and right, as a son to his father and mother; and said Richard Hale doth, on his part, agree to give the said George W. Witt, for his services, all the land that I hold in the 12th civil district of Jefferson county, and adjoining the lands of Thomas Hazlewood and others, being the land that I now live on; and it shall be the duty of my executors or administrators, so soon after the decease of myself and wife, to make, or cause to be made, a good deed, in fee simple, to the said George W. Witt. In testimony whereof, we have hereunto set our hands and seals, this 20th day of August, A. D., 1849.

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In presence of Charles Harrison, Samuel H. Witt.

(Signed,) " RICHARD HALE, [L. S.]
 " GEORGE W. WITT, [L. S.]"

The second agreement is as follows:

"Articles of Agreement entered into, July 21st, 1854, in the County of Jefferson and State of Tennessee, between Richard Hale, of the one part, and George W. Witt, of the other.

"WHEREAS, Said Hale, on his part, does agree to give said Witt full possession of the farm which said Hale now lives on, and to have the upper sugar orchard; and to have one-half of the barn, and the north end of the dwelling house and the kitchen, and one-half of garden, and one-half of a lot on the creek, for a potato patch; all of the above mentioned, said Witt is to have full possession of until death of said Hale and his wife, Margaret Hale.

"WHEREAS, Said Witt is to give said Hale, each year, one hundred bushels of good sound corn, fifty bushels of good, clean wheat, one hundred dozen of oats, one-half of the present meadow and clover, that is now on hand when cut—the corn to be put in the crib, oats and hay in the barn, wheat in the house; said Witt is to have the use of the wagon and gear for the hauling of said Hale's wood, and the keeping up of said wagon and gear.

"The above writing has no interference with the heretofore writing between said Hale and said Witt; but said Witt is to have the farm at their death.

"WHEREAS, Said Witt is to have possession the 1st day of October.

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“WHEREAS, We set our hands and seals; in the failure of either party, there shall be a forfeit, two hundred dollars.

(Signed,)

“Attest:

“RICHARD HALE, [L. S.]
“GEORGE W. WITT, [L. S.]

“JEREMIAH C. WITT,

“THOMAS RICHEY.”

Both parties are dead, and the suit has been revived in this Court. In April, 1856, Hale filed his bill in the Chancery Court, charging that Witt had failed in almost every particular to comply with his contracts; that he had grossly maltreated him by words and acts; and asking that the contracts be set aside, and the title to the land be reinvested in complainant, unencumbered with the agreements. The bill alleges that complainant can neither read nor write, and that the first agreement did not read as he expected it to read; and to make the best of a bad bargain, he entered into the second agreement. This, in any event, was a ratification of the first. There is no allegation nor proof of fraud in the obtention of the contract or agreements.

The two writings are, in fact, but one contract—the one on the 21st of July merely ascertaining, as to some articles of necessities provided for in the first the amount and place of delivery of such articles. The papers make an indented bond between the parties, of the one to sell, and of the other to buy, a tract of land, fixing the terms of payment, and the time of conveyance of the legal title.

In the bill, no ground is assumed, upon which, if proven, a Chancery Court is authorized to rescind or declare void the contract. There is nothing in the con-

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tract to authorize the exercise of such jurisdiction; nor does the proof make a case calling for its exercise. For each of the breaches alleged and proven, the complainant could have maintained his action at law. Under the prayer of the bill, the complainant is entitled to an account against the defendant for his expenditures in procuring the means of support, and other things for himself and wife, as provided for in the agreement, and which Witt failed to supply; the defendant to be credited by the value of such as he furnished; the complainant having a lien upon the land for such balance as may be found due him. The decree of the Chancellor is reversed, and a decree pursuing the direction of this opinion is pronounced.

The cause is remanded to the Chancery Court at Dandridge for further proceedings.

PETER SHARP v. GEO. FIELDS, JAMES HAMMOCK and
JOHN MCHONE.

1. EQUITY PLEADING. *Allegation of title.* A bill charging that the title of A, a former owner of land in fee simple, "has been vested in complainant by operation of law," sufficiently alleges that he has title.
2. SAME. *Same. Of tenancy.* A charge in the bill that defendants were occupying lands at the death of the tenant for life, and that complainant permitted them to remain after the death, and is entitled, as owner, to one-third of the crops as rent, is a sufficient charge of indebtedness to support an attachment for rent.

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3. EQUITY JURISDICTION. *Attachment for rent.* A court of equity has jurisdiction of an attachment to enforce a landlord's lien for rent.

FROM UNION.

In the Chancery Court of Maynardsville, O. P. TEMPLE, Ch., presiding.

W. P. WASHBURN, for complainant.

W. R. EVANS, for defendant.

DEADERICK, J., delivered the opinion of the Court.

The bill in this case was filed October 1, 1867, and charges that Allen Hurst was the owner of a certain tract of land in Union county, in which Lucy Fields had a life estate; that Lucy Fields had died, and the entire estate was thereby vested in said Hurst, and that the title of said Hurst had been vested in complainant, by operation of law; that defendants, George Fields and John McHone, were occupying said lands at the death of Lucy Fields; and that they and defendant, Hammock, cultivated portions of the land; and that complainant, after the death of said Lucy Fields, permitted the defendants to remain upon the land, and is entitled, as owner of the land, to one-third of the crop; that the defendants intend, fraudulently, to dispose of their crops, to prevent complainant from getting the rent due him, and prays for an attachment, &c. The defendants demur to the bill for the following reasons, to-wit:

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1st. That neither complainant nor Hurst ever had possession of the land.

2d. That complainant's remedy is at law.

3d. Complainant does not allege any indebtedness by defendants to him,

4th. That there is no equity in the bill.

At the November Term, 1867, of the Court, the demurrer was disallowed, but at a subsequent day of the same term, an order was made, vacating the previous order disallowing the demurrer, by consent of parties, and leaving the questions upon the demurrer open for future adjudication. At May Term, 1868, the demurrer was allowed and the bill dismissed, upon the grounds that there was no privity of contract, between the complainant and defendants, and the complainant had not shown sufficient title in himself, and he had a complete remedy at law. The defendants appealed to this Court. We think the decree of the Chancellor was erroneous.

The bill sufficiently alleges that complainant is the owner of the land, and that defendants are his tenants. The tenant of the ancestor, or vendor of the land, becomes the tenant of the heir or vendee, and can no more dispute the title of the heir or vendee, than he could that of the landlord from whom he rented. The possession of the tenant, is the possession of the landlord, and of his vendee or heir at law.

The Code, 3539, 3540 and 3541, gives a lien for any debt by note, account or otherwise, created for the rent of land, upon the growing crop, which may be enforced by original attachment. This attachment may be issued at law; and we see no reason why it may

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not likewise issue from a Court of Chancery, especially when it is alleged in the bill that the defendants are intending fraudulently to dispose of the crop, to defeat complainant's right to his rent. It is not necessary, in such a case, to allege that any specific sum is due. It is sufficient to show that defendants, as tenants, owe rents, which they are endeavoring, fraudulently, to place beyond the reach of the landlord, for the purpose of defeating his claims.

Let the decree of the Chancellor be reversed, and the cause remanded, with leave to defendants to answer.

WILLIAM CURD v. R. A. DAVIS.

1. VENDOR'S LIEN. *Want of title in vendor.* On a bill to enforce a vendor's lien, defects in the title can not be set up by answer, to defeat a sale. To be available, they must be presented by cross bill. Case approved, *Hurley v. Coleman*, 3 Head, 265.
2. PRACTICE. *Answer as cross bill.* Answer can not be treated as cross bill, unless security is given. *Harrell v. Harrell*, 4 Cold., 377.
3. PURCHASE MONEY. *Interest on.* The interest on an account for purchase money, with payments, is to be computed on the basis of partial payments.

FROM MORGAN.

In the Chancery Court at Montgomery, L. A. GRATZ, Special J., pronouncing the decree; L. C. HOUK, J.,

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presiding at the time of the decree on exceptions to the account.

The account was taken, giving all the credits without reference to date, and computing the interest on the balance.

The exception sustained, is in these words :

1st. The calculations should be made on the basis of partial payments.

COCKE & HENDERSON, for complainants.

D. K. YOUNG, for defendants.

NICHOLSON, C. J., delivered the opinion of the Court.

The bill in this case is filed to enforce the vendor's lien, by the sale of the land for the satisfaction of an unpaid balance of the purchase money. The defendant answers and admits the purchase, and that a portion of the purchase money remains due and unpaid. But he resists a decree of sale, because, as he alleges, he purchased under an agreement and with the understanding that he was to have a conveyance in fee simple, with covenants of general warranty, that the conveyance made to him does contain such covenants; but he insists that the title to a large portion of the land is defective, and that complainant is a non-resident, and is insolvent; and, therefore, that the land ought not to be sold to satisfy the unpaid purchase money. He prays that his answer may be taken as a cross bill, but fails to execute the bond required in such case; and for that, the Chancellor

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properly treated it only as an answer. This Court, in like manner, can regard it only as an answer. *Harrell v. Harrell*, 4 Cold., 377.

No proof was made to sustain the allegations in the answer; nor could such proof have availed him, inasmuch as he failed to put himself in an attitude to obtain relief under a cross bill. The case of *Hurley v. Coleman*, 3 Head, 265, is conclusive of the present case. It is there held, that "no question can be made by the defendant, as to the title, in resistance of the application simply to sell the property. If any grounds exist for a controversy on that subject, they must be presented by a cross bill, or in some other mode, by the vendees." There is, therefore, no error in the decree adjudging a sale of the land for the satisfaction of the residue of the purchase money.

But we are of opinion that the Chancellor erred in disallowing the first exception of complainant to the report of the Clerk and Master, as to the amount of the unpaid purchase money. The interest should have been calculated on the basis of partial payments. To this extent we reverse the decree, and in all other respects the same is affirmed. The cause will be remanded to the court below, for the execution of the decree, as herein indicated.

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WILLIAM EVANS *et al.* v. HENRY EVANS *et al.*

CHANCERY PRACTICE. *Decree correcting omission.* The adjustment of advancements having been omitted in a distribution of the proceeds of a sale for partition, they were allowed to be adjusted in the distribution of rents.

FROM GREENE.

In the Chancery Court at Greeneville, J. P. SWANN, J., presiding.

WM. H. MAXWELL, for complainant.

R. MCFARLAND, for defendant.

NICHOLSON, C. J., delivered the opinion of the Court.

This cause was before this Court, at the September Term, 1865, when it was remanded to the Chancery Court at Greeneville, with directions for the sale of the lands of Evan Evans, deceased, for partition, for the ascertainment and collection of advancements, and for an account of the rents and profits of the lands to the day of sale. The lands were sold, and the sale confirmed. The account, as to rents, was taken and excepted to, but the exceptions disallowed, and the report confirmed.

The amount of rent so found against Henry Evans, was \$476, for which judgment was rendered at the May Term, 1869, from which judgment, defendant, Henry Evans, prayed for and obtained an appeal to this Court.

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The appeal was allowed by the Chancellor, as in his discretion he had the right to do. We think the appeal was properly allowed, and overrule the motion to dismiss it.

Upon examination of the decree appealed from, it appears that defendant, Henry Evans, was ordered to pay into Court, for distribution, as in former decrees directed, the said sum of \$476, with interest as aforesaid. It is said for defendant, Henry Evans, that this decree is erroneous, for the reason that, in ordering a distribution of the rents, it was necessary that the advancement, as well as the rents, should be taken into the account in ascertaining the amount to be paid into Court by defendant, Henry Evans.

It appears that the Clerk and Master, at a former term, had reported advancements made to three of the hers amounting to \$391, to which no exception was taken. It appears, also, that in distributing the proceeds of the sale of the land, no notice was taken of these advancements. By sections 2432 and 2433 of the Code, this should have been done. Having failed to collate the advancements in the partition of the proceeds of the sale of the land, the defendant, Henry Evans, had a right to have it done before the rents were distributed. In this respect, therefore, the decree appealed from was erroneous. In collating the advancements and the rents, the whole amount of the rents as well the \$476 unpaid as the rent of 1866, of \$100, which had been paid, should have been brought into the account, and defendant, Henry Evans, should have had the benefit of a deduction on account of the advancements to

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the three heirs so advanced, so that he would be chargeable with interest on the actual balance due from him for rents, instead of on the whole amount as decreed. To this extent the decree below was erroneous, and is therefore, reversed. The cause will be remanded to the Chancery Court, where the correction indicated will be made, and the decree in all other respects, be executed and carried out. The costs of this Court will be paid out of the fund arising from the rents.

L. HUDDLESTON *et als*. v. JOHN A. WILLIAMS.

1. CHANCERY JURISDICTION. *Remedy at law. Purchaser at Chancery sale.*
If purchasers of personal property, attached and sold under a Chancery decree, in a case in which they were complainants, are sued at law, by the defendant in that suit, for the value of the property, their defense at law is plain and unembarrassed, if their decree is valid, and they cannot sustain a bill to enjoin the suit at law.
2. SAME. *Same. Same. Clerk and Master.* A personal representative of a deceased Clerk and Master, sued at law for the sale of property by his intestate, under a decree, cannot maintain a bill to enjoin the suit.

FROM UNION.

In the Chancery Court at Maynardsville, O. P. TEMPLE, Ch., presiding.

M. L. HALL, for complainants.

E. C. CAMP, for respondents.

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TURNEY, J., delivered the opinion of the Court.

The bill in this case is demurred to, upon the ground that complainants have a plain, adequate, unembarrassed remedy at law. The demurrer is allowed by this Court.

The bill charges, substantially, that some time in 1861, John A. Williams left the State, went to Kentucky, and joined the Federal Army; that when he left he was indebted to some of complainants, who filed an attachment bill, attaching certain personal property. Their attachment suit matured, and the property was sold under a decree of the Chancery Court. At the sale, some of the complainants purchased of the property, and others were present, but did not purchase; others were not present; that Williams, on the 3rd day of February, 1866, commenced an action in the Circuit Court of Union county, to recover of them the value of the personal property sold, in pursuance of said decree, by the Clerk and Master, whose personal representative is sued at law, and who is also complainant in the bill.

The prayer of the bill is, to enjoin the suit at law, &c. According to the statements of the bill, the fact of the purchase at a Chancery sale must be, of course, shown by the proof of the plaintiff at law. But if this were not so, under a proper state of pleading, that sale and purchase can be shown at law, and when shown, will acquit complainants who purchased, of liability to the action of Williams. Those who were not present, or who did not purchase, are acquitted under the general issue. From the statements in the bill, we are unable to see any difficulty to complainants in making the

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defense at law, as the general issue raises every question of defense, and admits all the necessary evidence to sustain it.

It is insisted by complainants, that theirs is a bill to execute a decree. We do not think so. In this instance, the decree had been executed, the property sold was taken possession of by the purchasers, and the sale confirmed; the suit in the Chancery Court had ended, with nothing remaining to be done. A bill to execute a decree, is a bill assuming, as its basis, the principle of the decree, and seeking merely to carry it into effect. For example, such a bill may be filed where an omission has been made in consequence of all the facts not being distinctly on the record, or where, owing to the neglect of the parties to proceed under a decree, their rights have become embarrassed by subsequent events, and a new decree is necessary to ascertain them, or when a decree has been made by an inferior court of equity, the jurisdiction of which is not equal to enforce it. Adams' Equity, top p. 826, marg., 415.

It is also insisted, that the purchasers at the sale became *quasi* parties to the suit, and are, thereupon, entitled to the protection of the Court. This was so while the suit pended after their purchases, but at the termination of the suit they ceased to be parties, or in any way under the orders or control of the Court.

Much has been said in argument as to the regularity of the proceeding in the Chancery Court, under which the sale was made. That question is not before this Court, and we can make no decision of it.

The Chancellor disallowed the demurrer to the bill

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before us. Answers were filed, proof taken, and the cause heard. The Chancellor decreed that Williams be perpetually enjoined from the prosecution of his suit at law.

The decree is reversed, the demurrer sustained, and the bill dismissed.

A. P. GREENE v. JAMES H. STARNES *et al.*

1. EVIDENCE. *Maker. To impeach deed.* The maker of a deed is not precluded from giving evidence to impeach it for fraud against creditors. *Calloway v. Willie's Lessee*, 2 Yer., 1, 5.
2. SAME. *Warrantor.* A warrantor before the Act of Nov. 26. 1869, was incompetent, by reason of interest, to prove the validity of his own conveyance. *Burke v. Clark*, 2 Swan, 310; *Elliott v. Boren*, 2 Sneed, 662; *Lawrence v. Senter*, 4 Sneed, 54; *Ingram v. Smith*, 1 Head, 423.
3. FRAUDULENT CONVEYANCE. *Priority. Creditor of vendor, and alimony to wife of vendee.* The right of a creditor, filing a bill, to set aside a fraudulent conveyance to a husband, is preferred to the claim of the wife to alimony, not ripened into a decree at the filing of the creditor's bill. *McGhee v. McGhee*, 2 Sneed, 223.
4. SURETY. *Exoneration. Before judgment.* A surety may bring his creditor and his principal before a court of equity to compel the payment of debts, and to be exonerated, and attack fraudulent deeds before judgment. *Howell & Magel v. Cobb*, 2 Cold., 105.
5. CHANCERY PLEADING. *Objection to jurisdiction.* Objection, that the surety has no right until judgment against him, if good, would be waived, unless insisted on by the plea, demurrer, or motion to dismiss. Code, 4309.

Cases reviewed, *Williams v. Tipton*, 5 Hum., 66; *Henry v. Compton*, 2 Head, 552; *Dechard v. Edwards*, 2 Sneed, 102; *McNairy v. Eastland*, 10 Yer., 316, 320.

Code construed, §§ 4288, 4291, 3457.

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Cases modified, *Hopkins v. Webb & Hayes*, 9 Hum., 519; *Chester v. Greer*, 5 Hum., 34, 35; *Williams v. Tipton*, 5 Hum., 66.

FROM GRAINGER.

From the Chancery Court at Rutledge, S. J. W. LUCKY, Ch., presiding.

R. M. BARTON, for complainant.

J. T. SHIELDS, for respondents.

NEELSON, J., delivered the opinion of the Court.

The complainant alleges, in his bill, that he is the security of James H. Starnes and William Popejoy, in one or more notes to John Nance; that his principals are unable to pay said debt, and that he is entitled to be exonerated by having certain deeds of conveyance declared fraudulent, and the tract of land therein mentioned, subjected to the satisfaction of said indebtedness.

Process of attachment and injunction were duly issued, levied and made known; and the proper parties were brought before the Court.

Objection was made in argument, to the sufficiency of the proof as to complainant's liability. But it appears satisfactorily, from the answer of John Nance and judgment *pro confesso*, that, on the 7th of July, 1860, complainant became security to him, for the persons named in the bill, in a note for fifteen hundred dollars, payable two years after date, and bearing interest from date.

It appears that James H. Starnes was the owner of the tract of land in the pleadings mentioned; that he

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conveyed it to his daughter, Mary C. Starnes, on the 24th day of January, 1861; that on the 20th of March, 1861, the said James H. and Mary C. conveyed the same tract to Stephen Atkins, by whom it was conveyed to Pleasant Starnes, on the 23rd of January, 1863, by a deed improperly admitted to registration, on the evidence of a single witness.

Each of the deeds are attacked in the bill for fraud; and it is further alleged, that on the 22nd day of November, 1865, Milly Atkins filed a bill for divorce and alimony against her husband, Stephen Atkins, and others; that at the July Term, 1866, of the Chancery Court at Rutledge, in which the present bill was filed, she obtained a decree for divorce and alimony, the latter consisting of certain notes executed to her said husband by Pleasant Starnes, for the purchase money, or a part thereof, of the said tract of land, and vesting in her, by substitution, the vendor's lien of her husband.

It appears that an account was ordered in the last named cause, to ascertain the amount of said notes; that no final decree has been pronounced therein, directing a sale of the land; and the complainant in this case, insists that his rights, as a creditor, are to be preferred to the wife's right to alimony.

It is fully admitted in the answers of James H. and Mary C. Starnes, that the two deeds of conveyance first named, were made to hinder and delay creditors; and the same fact is admitted as to the deed first executed, in the joint answer of Pleasant Starnes and Milly Atkins. But the two latter deny that the deed from James H. and Mary C. Starnes to Atkins, was fraudulent, and

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insist that the contract between Atkins and Pleasant Starnes was valid and binding; that the said Pleasant was to pay one thousand dollars and a wagon for the land; that he had delivered the wagon and executed his notes for the residue of the purchase money, which are still outstanding, and were attached in the said suit, in which Milly Atkins is complainant.

It is furthermore insisted, in their answer, that Stephen Atkins had fully paid the purchase money due from him for the land, by satisfying certain debts due from James H. Starnes to Warham Easley and others.

No answer was filed by Stephen Atkins, and judgment *pro confesso* was regularly obtained and entered against him.

On the hearing, complainant excepted to the deposition of Stephen Atkins, and defendants excepted to the reading of the depositions of James H. Starnes and Mary C. Starnes; which exceptions were disallowed as to the depositions of Mary C. Starnes and Stephen Atkins, but allowed as to James H. Starnes; the depositions of the two former being read, and of the latter, not read, upon the hearing.

Upon the controlling questions presented by the pleadings, and submitted in argument, we are of opinion:

1st. That Mary C. Starnes and James H. Starnes were competent witnesses to prove that the deeds executed by them, or either of them, were executed fraudulently, and with intent to hinder and delay creditors.

Whatever diversity of opinion may have existed, or may still exist in other States, as to the competency of a witness to swear to his own turpitude in the execu-

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tion of a deed, the question has long been *res adjudicata* and is no longer open to controversy, in this State. It was fully considered, and the opposing authorities cited and reviewed by Judge Haywood, in delivering the opinion of this Court, in the case of *Calloway v. Willie's lessee*, 2 Yer., 1, 5. And the principle then established, has since been acquiesced in, on the ground that the witness does not testify in favor of or against his own interest. In a legal point of view, he has nothing to gain, because he can not set aside his own fraudulent act; and nothing to lose, because his vendee being a party to the fraud, can obtain no relief against him. And so he falls within the rule as laid down in 1 Greenl. Ev., §§ 390, 410.

2d. On the other, Stephen Atkins was not a competent witness to establish his deed to Pleasant Starnes; because of the covenant of warranty contained in his deed. Nor was he competent to prove the payment of the consideration by himself, to or for the benefit of his vendors, as in either view, he was directly interested. This principle is firmly settled by the cases of *Burke v. Clarke*, 2 Swan, 310; *Elliott v. Boren*, 2 Sneed, 662; *Lawrence v. Senter*, 4 Sneed, 54; and *Ingram v. Smith*, 1 Head, 423.

And we do not deem it necessary to reiterate the reasoning upon which those cases are founded; or to review the authorities to which we have been referred, which relate chiefly to negotiable instruments and questions of commercial policy and law.

3d. We have attentively examined all the testimony contained in the record, and without here entering into

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an elaborate analysis of the statements of the witnesses, we deem it sufficient to declare as the result of that examination, that the various deeds before referred to, were made with the intent to hinder and delay creditors, and are fraudulent and void.

4th. No opinion is announced as to what would have been the effect of the decree in favor of Mrs. Atkins, if the the Master's report had been confirmed, and her suit finally terminated.

The bill in this case was filed before any final decree in that cause was pronounced; and it has been heretofore determined by this Court, that "upon well established general principles of law, the claims of the husband's *bona fide* creditor, or liabilities properly incurred on his behalf, existing prior to the application for divorce, must prevail over the rights of the wife." See *McGhee v. McGhee*, 2 Sneed, 223.

Holding, as we do, that the deed to Stephen Atkins was fraudulent and void; that his deed to Pleasant Starnes was improperly admitted to registration; and that the latter does not maintain the attitude of a purchaser for a valuable consideration without notice, the proceedings in the suit for divorce do not interpose any barrier in the way of the relief sought by complainant.

5th. Former adjudications of this Court have established, "that a surety has the right to bring the creditor and his principal before a Court of Chancery, and compel the payment of the debts, so as to exonerate himself." See cases cited in Heiskell's Dig., 494, § 512; 1 Story. Eq., §§ 327, 730, 849. But prior to the adoption of the Code, it was held, that he is not entitled to

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aside fraudulent conveyances before any loss incurred or payment made. *Williams v. Tipton*, 5 Hum., 66. Subsequently to the latter case, it was held, that sureties, by virtue of their liability to suffer, had a right, before paying the debt, to file their bill to restrain the conveyance of land, and have it applied to their relief. *Henry v. Compton*, 2 Head, 552; and in *Decherd v. Edwards*, 2 Sneed, 102, it was determined that a surety has the right to avail himself of all liens, rights and advantages of the creditor against his principal debtor, or his property, by substitution; and that the security in a delivery bond could, before payment of the debt, file a bill in equity for the protection of the property. In *McNairy v. Eastland*, 10 Yer., 316, 320, the jurisdiction of a court of equity to grant relief, either to the creditor or surety, in regard to the equitable real or personal estate of the debtor, was treated as being ancillary to that of a court of law, and founded upon the lien of the judgment as to equitable real estate, and of the execution as to equitable personal estate.

The Code, 4288, authorizes any creditor, without having obtained a judgment at law, to file his bill in Chancery for himself, or for himself and other creditors, to set aside fraudulent conveyances of property, or other devices resorted to for the purpose of hindering and delaying creditors, and to subject the property by sale or otherwise, to the satisfaction of the debt. And by 4291, the same power and jurisdiction are conferred upon the Court, in all respects, to set aside fraudulent conveyances and other devices, as if the creditor had obtained judgment, and execution thereon had been

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returned unsatisfied. We are of opinion that, within the meaning of this statute, and in the view of a court of equity, a surety, before payment of the debt, is a creditor in such a sense, as that he may bring his principal and the creditor into a court of equity, and obtain exoneration out of the property, real or personal, fraudulently conveyed by the former, or its proceeds in the hands of any one who is not a *bona fide* purchaser without notice. Section 3457 provides, "that any accommodation endorser or surety may, in like manner, sue out an attachment against the property of his principal, as a security for his liability, whether the debt on which he is bound, be due or not."

It is manifest that the object of the Legislature in making these provisions in the Code, was, to facilitate the remedy against fraudulent conveyances, and to obviate the cases in which it had been held, in giving a construction to the Act of 1801, c. 25, § 2, that no man can be recognized as a creditor, until he has established his right to claim in that character by a judgment at law or a decree in Chancery. See *Hopkins v. Webb & Hays*, 9 Hum., 522; *Chester v. Greer*, 5 Hum., 34, 35; *Williams v. Tipton*, 5 Hum., 66.

But even in the case last cited, it was said, "it is true that, arising from the relation of suretyship, the right does exist in the surety, for his own protection, to bring the principal and the creditor into a Court of Chancery." This view was substantially taken, also, by this Court, in *Howell & Maget v. Cobb*, 2 Cold., 105.

If any doubt can exist as to the correctness of the construction given to the enlarged remedy provided by

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the Code, it is obviated in this case by the failure to resist the jurisdiction by plea in abatement, demurrer, or motion to dismiss, as provided in Code, 4309.

Affirm the Chancellor's decree.

WM. S. CREED v. WM. C. SCRUGGS.

EQUITY JURISDICTION. *To vacate judgment at law. Complainant must do equity.* A judgment by motion, obtained in favor of one surety on a note against another surety as a principal, his character of surety not appearing on the note itself, is voidable, and may be enjoined in equity. But the complainant, in such case, will only be relieved on condition that he pay his moiety.

FROM HAWKINS.

In the Chancery Court at Rogersville. The name of the Judge who rendered the final decree, does not appear in the transcript.

JAMES T. SHIELDS, for complainant.

NELSON, J., having been of counsel, did not sit in this cause.

R. M. BARTON presented brief of NELSON, J., for defendant.

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NICHOLSON, C. J., delivered the opinion of the Court.

J. B. Moore held a note on Richard D. Scruggs, William S. Creed and William C. Scruggs; the name of William C. Scruggs was signed as security. Moore recovered judgment against all three of the payors, in the Circuit Court of Jefferson county. At the same term of the court, William C. Scruggs moved for and obtained judgment against Richard D. Scruggs and William S. Creed, for the amount of said judgment of Moore, against the three payors of the note. This judgment was rendered in favor of William C. Scruggs as surety, against the other two payors as principals, the fact of his suretyship appearing on the face of the note.

William S. Creed files his bill to enjoin said judgment, and alleges that said William C. Scruggs and himself were co-sureties of Richard D. Scruggs, to the note; that the judgment was taken without notice, and that the fact of his being co-surety with said William C. Scruggs was fraudulently suppressed. Defendant, William C. Scruggs, denies that complainant and himself were co-sureties, and insists that he was surety of the other two payors; and that the judgment was, in all respects, valid.

Complainant having waived an answer on oath, the answer of defendant has the effect only of making up the issue between the parties.

The evidence is satisfactory as to the character in which complainant and defendant signed the note. Al-

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though complainant signed the note without indicating his suretyship, the proof shows that he did sign as such surety; and it is reasonably certain, from the facts and circumstances, that defendant knew, when he signed the note, that complainant was not a principal, but only a surety to the note.

Upon these facts, and it not appearing that defendant had paid the judgment, or any part thereof, he had no right to judgment by motion, against complainant, who was his co-surety. Code, 3625. But the judgment was not void for the reason that it did not appear upon the face of the note, that complainant was a co-surety. According to the face of the note, the Court was authorized to render the judgment under section 3620 of the Code. The judgment was, however, voidable upon showing the fact that complainant was not a principal, but a co-surety. This fact having been shown, complainant is entitled to relief; but as complainant is justly liable to pay one-half of the judgment, this Court will not deprive the defendant of his legal advantage without requiring complainant to do equity by paying his ratable share of the judgment. *Estis v. Patton*, 3 Yerg., 382. This is the conclusion to which the Chancellor came; and we affirm his decree. The costs of this Court will be divided.

Pearson & Smith, Exr's, &c., v. Joseph H. Davis, Adm'r, &c.

PEARSON & SMITH, Ex'rs, &c., v. JOSEPH H. DAVIS,
Adm'r, &c.

HUSBAND AND WIFE. *Sole and separate use.* A bequest of personalty to a daughter, living apart from her husband, to her own self (*sic*) and separate use, and her heirs, without the control of her husband, or his heirs or representatives, to trustees, for her sole and separate use during the continuance of her marriage, upon the dissolution of which it is to be paid over to her, shows a clear intent to exclude the marital right.

FROM CLAIBORNE.

From the Chancery Court at Tazewell. The name of the presiding Judge does not appear in the transcript.

No counsel appeared for complainants.

WALTER R. EVANS, for defendant.

DEADERICK, J., delivered the opinion of the Court.

The complainants are executors of Michael Pearson, deceased, and filed their bill in the Chancery Court at Tazewell, for the construction of his will, and for other purposes.

The only question submitted for our determination, is whether the defendant, Joseph H. Davis, is entitled, as administrator of his wife, Elizabeth, who was a daughter of testator, to the bequests to her in the will, or whether the same goes to her distributees and heirs at law.

By the fourth clause of the will, the testator be-

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queaths to his daughter, Elizabeth Davis, wife of Joseph H. Davis, the defendant, five hundred dollars.

By the fifth clause of the will, testator directs all his personal estate to be sold, and his debts to be collected, and the amount to be equally divided between his four daughters, Elizabeth Davis being one, and his son, Jefferson Pearson. Elizabeth Davis died after the death of testator.

The tenth clause of the will is as follows: "It is my wish and desire that all I have bequeathed to my daughter, Elizabeth Davis, be to her own self and separate use, and her heirs, without the control of her husband, Joseph H. Davis, or his heirs or representatives, and not liable to his control; and the more effectually to carry out this, my will and desire, I hereby appoint my executors, hereafter named, to be trustees for my said daughter Elizabeth, to receive and keep in their hands as such, all that may be coming to her under this will, to hold the same for her own sole and separate use, benefit and maintenance during the continuance of her marriage, upon the *dissolution* of which, it is to be paid over to her to be by said trustees loaned out at interest, and the annual interest paid over to her for her own use, and to dispose of as she may please, and from time to time, to pay over to her or her use, such portion of the principal as may be necessary or proper in the discretion of said trustees." Davis and his wife were living separately at the time of the making of the will. The husband's right to the property left his wife by her father must depend upon the construction of the tenth clause of the will.

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That the testator had a right to exclude the marital right of the defendant, altogether and absolutely, or only during the marriage, there can be no doubt. A husband will not be deprived of his wife's property, to which he is entitled by law, unless the intention be clear that he shall not derive any benefit from it. And if, from the just interpretation of the instrument, conferring a right to property upon a married woman, it appears that in no event shall the husband take any interest therein, a court of equity will carry into effect the intention of the donor or the grantor of the right.

No particular form of words is necessary to raise a trust for the use of the wife, or to exclude the marital rights of the husband. But whenever it appears from the nature of the transaction, or from the whole context of the instrument conveying the property to the wife, that she was intended to have it to her sole use, and that the marital rights of the husband were intended to be altogether excluded, such intention will be carried out by a court of equity.

In the case of *Loftus v. Penn*, 1 Swan, 446, the complainant and Ann E. Hargrove, in contemplation of marriage, entered into a written contract, conveying certain slaves of Ann E. to a trustee, in which it was stipulated "that the same shall be held and managed by Nathan Loftus, (the testator,) to and for the sole and separate use, benefit and disposal, of the said Ann E., and that the same shall, in no manner, be subject to the control, direction or disposal of the said Ralph W. Loftus, the intended husband, or liable for any of his debts; and the said Ralph W. shall not intermeddle with the said slaves or other property, or its produce;" and

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in default of a sale or disposition by will by the said Ann E., her administrator was to keep and dispose of said slaves and other property, and said Ralph W. was not to intermeddle therewith.

These provisions of the contract were held to be total exclusion of the marital rights of the husband, to the property left by the wife at her death, and the property not having been disposed of by the wife in her life-time, went under the statute of distributions, to her next of kin.

It is manifest, from the language employed, and the appointment of the trustee to hold the property, that the testator designed to exclude Joseph H. Davis from all control over, or right to, the bequests to his daughter, not only during her coverture, but ever afterward. He says, these bequests to her are "to be to her own *self* and separate use, and her heirs, without the control of her husband, or his heirs or representatives;" and again he says, "to her own sole and separate benefit and maintenance, during the continuance of her marriage; upon the dissolution of which, it is to be paid over to her," &c. He provides not only against the right or control of the husband, but also against the claim of his heirs or representatives," and explicitly declares that his heirs or representatives shall be excluded after his death, as that he himself shall be, during his life, from any control over the bequests to the said Elizabeth. The will also provides that the trustees shall keep the fund in their hands for the said Elizabeth, during the continuance of the marriage, and upon its dissolution, pay it over to her.

This rather remarkable provision implies that testator

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expected his daughter would obtain a divorce from, or survive her husband. And it is a further manifestation of his intention, that the defendant, Davis, should not take any interest in, or control of, his bequests to his daughter during her coverture, or after the dissolution of the marriage.

We therefore hold, that the defendant is not entitled to take the interest of his wife in her father's estate, under his will. But the same will go under the statute of distribution, to her next of kin. The Chancellor so held, and we affirm his decree.

Let the cause be remanded for further proceedings.

JOHN WOLFE v. E. P. CAWOOD & Co.

CHANCERY PLEADING. *Attachment Bill. Answer in response, and avoidance.* An answer to a garnishment bill, stating, in response, that the respondent had executed to the debtor a note, still due, but in avoidance; that it was done with the understanding that he was to pay the money to a third person, without showing that he had paid to that person, or showing that the person held the note, or where it was, there being no proof as to the matters in avoidance, was held to charge the respondent as debtor of the person to whom he gave the note.

FROM SULLIVAN.

In the Chancery Court at Blountville, before S. J. W. LUCKY, Ch.

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DEADERICK, J., having been of counsel, did not sit, J. T. SHIELDS, Special Judge, sitting in his place.

F. W. EARNEST, for complainant.

Brief of DEADERICK, J., for defendant.

NICHOLSON, C. J., delivered the opinion of the Court.

Defendant, E. P. Cawood, was indebted to complainant in the sum of one hundred dollars. Defendant, Pile, was indebted to defendant, E. P. Cawood, in the sum of three hundred dollars. E. P. Cawood being a non-resident, complainant filed his attachment bill in equity, to attach the debt due from Pile to E. P. Cawood, and to have it applied to the satisfaction of his debt against E. P. Cawood.

Defendant, E. P. Cawood, fails to answer, and there is judgment *pro confesso* against him. Defendant, Pile, answers that he did execute the note for \$300, as alleged, to E. P. Cawood, and that it is due from its date. But he insists that he does not owe E. P. Cawood anything, because, when he executed the note, it was the understanding that he was to pay the money to one Allison, to whom E. P. Cawood was indebted in about \$300. He does not state that he has ever paid anything to Allison, or that Allison ever had the note, or that he does not know where the note is. Nor does he take any steps, by bill of interpleader, or otherwise, to bring Allison before the Court. But whilst he admits that he owes the three hundred dollar note,

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made payable and delivered, when executed, to E. P. Cawood, yet he insists that he is not bound to pay the money to Cawood, but to Allison.

This cause must be decided according to the rules of practice and course of proceedings in the Chancery Court, in which the answer of defendant is available as evidence only so far as it is responsive to the allegation of the bill. The allegation in the bill is, that defendant, Pile, executed to defendant, Cawood, his note for \$300, and that the same is unpaid. The answer responds that this allegation is true; but, by way of avoidance, states that he is not bound to pay the money to defendant, Cawood, but to one Allison, because of an understanding to that effect. This matter in avoidance rests entirely upon the answer—no proof having been taken to sustain it. It is not necessary to decide what would have been the result if this matter in avoidance had been sustained by proof. It is sufficient for the present, that by his response in the bill, defendant, Pile, has acknowledged that he is indebted, as alleged, to Cawood; and upon this admission, complainant is entitled to have his debt against Cawood satisfied out of said indebtedness.

The decree of the Chancellor will be reversed, and a decree rendered for complainant.

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GEORGE W. LYNCH, Ex'r, v. JENNIE BURTS *et al.*

WILL. *Construction. Sum given for a purpose which fails.* A will contained a bequest of freedom to a slave, on the death of a testator's wife, the freed woman to be sent to "Liberia or some other suitable place, and to meet the expense," \$500, to be set apart, to be "placed in faithful hands, to inure" to her benefit. Held, that on the emancipation proclamation, by law, the legatee became entitled absolutely to the \$500.

FROM JEFFERSON.

In the Chancery Court at Dandridge, SETH J. W. LUCKY, Ch., presiding.

J. T. SHIELDS, for complainant.

BARTON & MCFARLAND, for defendant, cited *Hartsell v. George*, 3 Hum., 255; *Jacob v. Sharp*, Meigs, 114; *McCloud v. Chiles*, 1 Col., 248.

SNEED, J., delivered the opinion of the Court.

The bill is brought by the executor of the last will and testament of George Squibb, deceased, to obtain a construction of a clause in his will, and the directions of the Court in the disposition of a legacy of \$500, therein bequeathed to the benefit of the respondent, Jennie Burts. The clause is as follows: "I further direct that my negro girl, Jennie, shall, at the decease of my wife, be set

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free, and sent to Liberia or some other suitable place; and to meet the expense thereof, I hereby direct my executors to set apart from the sale, property, as may best suit my wife, Mary Squibb, the sum of five hundred dollars, which shall be placed in faithful hands, to inure to the benefit of said Jennie." The will was executed on the 30th of October, 1852, and the above is a literal copy of the clause in controversy.

The bill alleges that Jennie was the slave of the testator, and that the bequest was upon the condition that Jennie should remain in the service of the testator's wife until the death of the latter; that the said Jennie had not observed said condition, in that she had abandoned her mistress in September, 1863, claiming to be free under the public events of the late civil war; that she had forfeited the bequest, and that, as by the changed condition of things, no expense would be necessary in the transportation of said Jennie to Liberia or elsewhere, the complainant asks the direction of the Court as to the disposition of said sum of five hundred dollars, which he insists was intended solely to defray the expenses of placing Jennie in a free country.

The widow, Mary Squibb, to whom the whole estate is given for life; Elijah H. Miller, the devisee in remainder of the real estate, and the said Jennie and her husband, Henderson Burts, with whom she has intermarried since the execution of the will, are made parties defendant, with a view to interplead as to their respective rights. It is stated at the bar that Mary Squibb died since the service of process upon her, but there is no proof thereof in the record. The bill does not waive

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the answers under oath, and the only answer filed, is by Henderson Burts, and Jennie, his wife, which is under oath.

The answer denies the abandonment, and avers that the respondent, Jennie, did remain with her said mistress, and faithfully serve her, until about the latter part of the war, when her said mistress ordered and commanded her to leave the place; and in obedience to said positive orders, she did leave it; and the respondent, Jennie, insists, that, though she had acquired her freedom in a manner not contemplated in said will, her rights under the same could not be impaired. There was no testimony in the cause, but it was submitted and determined on the bill and answer.

The Chancellor held that the respondent, Jennie, was entitled to the bequest of \$500, with interest, from the rendition of the decree, and awarded execution in behalf of the said Jennie and her husband, to be levied of the assets of the testator in the hands of the complainant. Upon the question of interest, the decree is as follows: "But because no steps have been taken by the said Jennie, or any other person for her, to collect said legacy, or to establish the liability of the executor of said will to pay the same, and from the language of said provision, the said executor was fully justified in withholding the payment of the same; the the Court is further pleased to declare, that the said Jennie is not entitled to the interest on the same, until the rendition of this decree." The complainant alone has appealed.

From the earliest period in the jurisprudence of this

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State, the courts have guarded with the utmost jealousy, the right of freedom, when asserted by a slave. The technical doctrines of the common law, touching gifts of other species of property, by deed or by parol, have been made to yield *in favorem libertatis*, whenever that paramount right was placed in peril by the rigid adherence to such rules. While, during the existence of the institution of slavery, the rights of both master and slave were protected and enforced; yet the most humane and enlightened policy pervaded the spirit of our laws, even when the right of freedom was asserted on the one hand and denied on the other. The adjustment of rights growing out of a species of property, characterized by the Court in *Henderson v. Vaulx*, 10 Yer., 30, "as a peculiar property, and a property in intellectual, moral and social qualities, in skill, fidelity and gratitude, as well as in capacity for labor," might well invoke, and even commend a relaxation of the severe rules of property, known to the common law. Thus, it has been held that if there be in a will a bequest of a present right of future freedom, to be enjoyed after the determination of a life estate in the slave's services, coupled with a contingent power of disposal in the legatee of the services, and there be doubt as to the construction of the will, the power of disposition must be construed to be subordinate to the higher and more important right of freedom. *Jacob v. Sharp*, Meigs R., 114. And so, when the provisions of a statute made it an imperative condition of emancipation, that the liberated slave should be transported to the

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western coast of Africa, and the testator directed that all his slaves should be set free and sent, at the expense of his estate, to a free State, it was held that the freedom of the slave was the primary object of the testator, which could not be defeated by the mere fact that the sending the slaves to a free State of this Union, is inconsistent with laws or comity of this State; that the bequest of freedom was a distinct and substantive thing, which no power but that of the State can question. *Boon v. Lancaster*, 1 Sneed, 578. And on account of a strong desire of a testator, evinced by frequent repetitions in his will, for the emancipation of his slaves, that intention was made to prevail over an express condition, that if they could not, under the laws, remain in the State, they should go to a named legatee. *Lewis v. Daniel*, 10 Hum., 314, *et vid.* *Laura Jane v. Hagen*, 10 Hum., 332; *Lewis v. Simonton*, 8 Hum., 188; *Hartsell v. George*, 3 Hum., 255; *McCloud et al v. Chiles et al.*, 1 Cold., 248.

It is said that the great rule in the construction of wills is, that the intention of the testator, ascertained from the particular words used, from the context, and from the general scope and purpose of the instrument, is to prevail and have effect. *Williams v. Williams*, 10 Yer., 20, 29. To this rule, it is held that all others except those founded upon public policy, and the necessity of sustaining established principles of law, are not only subordinate, but auxiliary. *Henry v. Hogan*, 4 Hum., 210; *Thompson v. McKisick*, 3 Hum., 631.

The testator in this case, directs that his negro girl,

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Jennie, be set free at the death of his wife, and sent to Liberia or some other suitable place; and to meet the expense thereof, his executor is directed to set apart five hundred dollars, which *shall be placed in faithful hands, to inure to the benefit of the said Jennie.* The primary object of the testator was the emancipation of the respondent. The words, that she shall be set free at the death of his wife, while they import a desire, on his part, that she should remain with his wife during the life of the latter, do not, in the opinion of the Court, impose any condition or restriction upon the bequest of freedom. It is an absolute present bequest of freedom, vesting at the death of testator, to be enjoyed *in futuro*. If, indeed, the condition alleged in the bill had appeared in the express terms of the will, yet the respondent, in her answer, has fully vindicated herself for its non-performance; and, in the state of the pleadings, her answer is conclusive. Her right of freedom being thus vested, can its incident, the right to demand and receive the pecuniary legacy, if it be a legacy, be defeated by the unforeseen result of a civil war, by which her freedom and its enjoyment were consummated, in a manner not contemplated in the will? We think not. The will had invested her with the right of freedom, of which nothing but the sovereign power could divest her; its enjoyment was postponed, but the right to the pecuniary bounty was a part of the bequest of freedom, and was intended to enable her to enjoy her liberty, when the right to enjoy had vested. The right of enjoyment came in advance of the time indicated in the will, and by a change in the fundamental

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laws of the State, in which the right of property in slaves was forever abrogated and destroyed. From and after that time, the former mistress had no right to the services of the respondent. Her vested right to freedom, under the will, had now ripened into an unrestrained enjoyment; and, at the proper time, she had a right to demand and receive the pecuniary legacy. The intention of the testator, it is true, was, that out of the five hundred dollars the expenses of her transportation to Liberia or some other suitable place, should be paid; but it is manifest, from the last words of the clause, that the testator did not contemplate the absorption of the whole amount in defraying the expenses of her transportation. The words, "shall be placed in faithful hands, to inure to the benefit of the said Jennie," mean something more than this. It is the declaration of a trust, and impresses the bequest with the character of a trust fund, out of which the respondent's expenses, to some suitable place for the enjoyment of the paramount gift of freedom, was to be paid, and the balance in some "faithful hands," to be held for her benefit.

The Chancellor was of opinion, it seems, that the respondent, Henderson Burts, the husband, would not be an unfaithful trustee to his wife, and awards execution for their benefit, without more. We feel that our interpretation of the intentions of the testator would not be fully carried out, without a modification of the decree to the extent of having the fund, when paid in, invested in such manner as better to secure it for the use of the said Jennie, under the order of the Court, as the tes-

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tator evidently did not intend that it should be paid to her in person. With this modification, the decree is affirmed, and the cause remanded for further proceedings.

SARAH CLICK, by her next friend, v. LEWIS CLICK *et als.*

1. TRUST, PAROL. *Husband and wife. Contracts between.* A husband; being one of two executors with a power to sell land and divide proceeds amongst devisees, of whom his wife was one, after a sale made on a credit, at which the son of him and his wife bought a tract of land for the wife, bidding a part of her share of the proceeds, giving no note, but taking a deed to himself; agreed by parol with his wife, before the purchase money fell due, that she should have the land for her sole and separate use. Held, that the marital right had not attached to the proceeds, and that the trust in favor of the wife, was valid.
2. SAME. The husband having subsequently taken a deed from the son to himself; held that he took it subject to the trust for the separate use of the wife.
3. SAME. *Preferred to debts of husband.* A creditor having attached the land as the property of the husband, the deed to him being registered; held, that the right of the wife was superior to the claims of creditors.†
4. INNOCENT PURCHASER. Purchaser at execution sale can not avail himself of the plea of innocent purchaser

FROM GREENE.

From the Chancery Court at Greeneville, J. P. SWANN, J., presiding.

R. M. BARTON, for complainant, cited on trusts with-

†See *Gass v. Gass*, post 613; *Susong v. Williams*, post 625.

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out the intervention of a trustee, 2 Sto. Eq., § 1380; *Goodrich v. Bryant*, 5 Sneed, 325.

On wife's equity to support a deed, *Simmons v. Kincaid*, 5 Sneed, 450; *Pritchard v. Wallace*, 4 Sneed, 405; *Harris v. Union Bank*, 1 Cold., 152; *Ready v. Bragg*, 1 Head, 511; *Chester v. Greer*, 5 Hum., 34; *Powell v. Powell*, 9 Hum., 477; *Exparte Yarborough*, 1 Swan, 202; *Dudley v. Bosworth*, 10 Hum., 9.

On trusts proved by parol: *Pritchard v. Wallace*, 4 Sneed, 405; *Butler v. Rutledge*, 2 Cold., 4; Purchaser without Sheriff's deed holds an equity. *Harold v. Harold*, 4 Cold., 480; *Crutsinger v. Catron*, 10 Hum., 24. Transfer does not affect trust. *Dudley v. Bosworth*, 10 Hum., 14. Purchaser at execution sale takes subject to all equities. *Arendale v. Morgan*, 5 Sneed, 715; *Bostick v. Minton*, 1 Sneed, 524, 540, 2 Lead. Cas. Eq., 75.

Plea of innocent purchaser. *High v. Batte & Bradley*, 10 Yer., 335; Sto. Eq. Pl., § 662; *Aiken v. Smith*, 1 Sneed, 304; *Guinn v. Locke*, 1 Head, 110.

PETTIBONE & GILLENWATERS, cited on equitable estoppel, *Wendell v. Renssellaer*, 2 Lead. Cas. Eq., 64; *Savage v. Foster*, 9 Mod., 35,

On plea of innocent purchaser, *Ld.*, *Rancleffe v. Parkins*, 6 Dow, 230; 2 Lead. Cas. Eq., 63; *Attorney-General v. Wilkins*, 17 Beav., 285, 289.

NICHOLSON, C. J., delivered the opinion of the Court

This is a contest between complainant and a creditor of her husband, Lewis Click, as to the title to a tract of land. She bases her title upon a resulting

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trust, arising from the purchase of the land by her husband, with her money. The creditor claims by purchase, at an attachment sale, in which it was sold to satisfy a judgment he had recovered against her husband—the legal title being in the husband at the time of the levy and sale.

The first question for determination is, whether, in fact, the land was purchased by the money of complainant? It appears that Jacob Crum, the father of complainant, died in Greene county, in 1858, having made his will, in which he directed his land and slaves to be sold, on a credit of twelve months, and the proceeds to be divided equally amongst his children, of whom complainant was one. He appointed Lewis Click, husband of complainant, and Wm. Crum, his executors. They qualified and proceeded to sell the land; and, at the sale, John Click, a son of complainant and of Lewis Click, became the purchaser, and to him the executors executed a deed. The purchase was made by John Click for complainant, with an understanding and agreement, between the executors and complainant, that the amount bid for the land was to be deducted from her share of her father's estate. Hence, no money was paid, and no note given; although the land was sold on a credit of twelve months. It appears that the amount bid for the land by John Click was charged to complainant by the executors, in their settlement, and the same was deducted from her share of the estate. The title of the land was held by John Click, for about a year, when he conveyed the same to Lewis Click, his father, and the husband of complainant. Nothing was

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paid, although the consideration of \$1,400 is expressed in the deed. This conveyance was made to Lewis Click for the benefit of complainant, but the fact of the said conveyance was not known by complainant until about 1865. John Click and Lewis Click held the title to the land for the benefit of complainant, and not for themselves. Both of the conveyances were registered. The fact, therefore, is clearly established, that the land was paid for with the means coming to complainant from her father's estate.

Whilst the title of the land was so vested in defendant, Lewis Click, to wit: on the 13th of July, 1865, defendant, Cooter, attached the land, as the property of Lewis Click, obtained a judgment and an order of sale; and on the 4th of May, 1868, the land was sold and purchased by Cooter, at the amount of his judgment and costs.

It is objected to complainant's claim to the land, that, by the will of her father, no devise of land was made to her, but that the land was directed to be converted into money, and that the bequest to her was of an equal share, in money, of the proceeds of the sale; that so soon as the land was sold, her husband's marital right attached to her share of the proceeds, and hence, that the land was, in fact, purchased with the money of her husband.

It is to be observed, that the land was sold on a credit of twelve months. Complainant's husband was one of the executors who sold the land, and, at the time of the sale, the share of complainant in the proceeds of the sale had neither been received by the executors nor al-

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lotted to her. She could not have claimed her share until the proceeds were collected, and the executors were ready to settle their trust and make distribution. Her husband, therefore, as husband, had not acquired possession, or right of possession, of her share, and his marital right had not attached when he agreed with complainant that her share might be vested for her sole and separate use, in the tract of land. This was a valid agreement on two distinct grounds—first, as there is nothing in the record showing that he was then in debt, he had a perfect right to settle upon his wife, to her separate use, her share to be derived from her father's estate, even if his marital right had attached; and, second, if she had filed her bill at that time, a court of equity would have enforced the wife's equity, by settling upon her and her children the whole, or a part, of her distributive share, in the discretion of the Court. As the husband voluntarily agreed to do what a court of equity would have done, the Court will uphold and enforce such agreement for her benefit. *Dearin v. Fitzpatrick*, Meigs, 551; 5 John. Ch. R., 464; *Simmons v. Kincaid*, 5 Sneed, 450. In the last named case, the Court say: "There are no creditors of the husband, at the date of the deed, complaining; indeed, it is not shown that any existed. The wife could have resorted to a Court of Chancery, and enforced her equity to a settlement. To the same extent, the same might be voluntarily done by the husband, as by this the expense and delay of a bill could be avoided.

* * But, independent of the wife's equity, a husband may make a reasonable settlement on his wife of his

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own property, as well as her's, saving the right of existing creditors in certain cases."

It follows, that the agreement between complainant and her husband, was valid and binding on her; and being based on a good consideration, could have been enforced by her in a court of equity. It follows, also, that when the deed was made to John Click for the benefit of complainant, the same having been executed by the executors, of whom Lewis Click, her husband, was one, the said agreement was consummated, and the title to the land was vested in John Click, in trust, for complainant. Complainant became the owner of the land by way of resulting trust; and although the deed, on its face, was absolute, the fact that John Click held the title merely as trustee, is susceptible of proof by parol. 2 Story Eq., §§ 1201, 1380; 4 Hum., 183; 5 Hum., 34; 9 Hum., 477; 10 Hum., 9; 2 Cold., 4; 4 Sneed, 405; 1 Head, 511; 1 Cold., 152.

When John Click conveyed the land to Lewis Click, the husband of complainant, he took the title, not for himself, but as trustee for complainant. 8 Yerg., 33; 2 Kent, 162; 2 Story Eq., § 1380.

The legal title to the land was in Lewis Click, with a resulting trust in favor of complainant. When the creditor attached, and purchased at his execution sale, he acquired only the title of Lewis Click, subject to prior equities, unless he was a purchaser for a valuable consideration, and without notice of existing equities, which, as a purchaser at execution sale, he could not assert. 1 Sneed, 524; 5 Sneed, 715; 2 Lead. Cas. Eq., 75, and authorities there cited.

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The defense of an innocent purchaser for valuable consideration, is not made by the defendant, Cooter, either by plea or in his answer, nor upon the facts in the record; could he, as before stated, have made that defense with success?

The result is, that complainant is entitled to the relief prayed for, not only as against Lewis Click, but against defendant, Cooter. The decree below is, therefore, reversed, with costs.

HYLA GASS v. ELLIOTT H. GASS, *et al.*

1. TRUST IMPLIED. *Parol proof.* Where one person buys land for himself and another, and pays a portion of the price out of the moneys of such other person, taking a deed to himself, a trust will be set up in favor of the person whose fund is so used.
2. SAME. *Preferred to creditors of trustee.* The beneficiary in such a trust has a right superior to the claims of creditors of the trustee, though no trust is declared in the deed.†
3. SAME. *Evidence to defeat.* A note taken by the supposed beneficiary for the money paid, and a delivery to the trustee of his bond for title, executed after the purchase, would ordinarily be conclusive against a subsisting trust.
4. FIDUCIARY. *Imbecile. Dealings between.* But the beneficiary being the mother of the trustee, old, speechless from paralysis, and of weak intellect, he being intrusted with all her means, and using them to procure the delivery of the note as paid, and there being no proof that he explained the transactions to her, the trust was held to remain in force.

†See *Click v. Click*, ante 607, and *Susong v. Williams*, post 625.

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5. **SAME.** *Same.* Credits on a note, placed there, or procured by the maker, under such circumstances, must be fortified by extraneous proof of fairness.
6. **EXECUTION SALE.** *Purchaser must produce record.* A party claiming as purchaser at execution sale, must show his right; merely to let it appear in an answer, without producing the judgment and proceedings, will not do.

FROM GREENE.

In the Chancery Court at Greeneville, before S. J. W. LUCKY, Ch.

McKEE & McFARLAND, for complainants, cited as to resulting trusts, 6 Hum., 99; *Smitheal v. Gray*, 1 Hum., 491; 3 Sneed, 242; 10 Hum., 9. Innocent purchaser, *Cook v. Cook*, 3 Head, 719; must plead specially, 2 Lead. Cas. Eq., 75.

R. M. BARTON, for respondents, cited *Bank v. Grundy & Hays*, Meigs, 256; *Gee v. Gee*, 2 Sneed, 395, 404; *Bostick v. Winton*, 1 Sneed, 524. He also presented a brief of the late T. D. ARNOLD.

NICHOLSON, C. J., delivered the opinion of the Court.

In 1849, the real estate of John Ross, deceased, was sold by order of the Chancery Court, for the purpose of partition amongst his heirs. At the sale, which occurred on the 2d of October, 1849, the tract of land in controversy, was bid off by defendant, Elliot H. Gass, at the price of \$729, for which he executed his two notes, at one and two years, with complainant, his

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mother, as one of the securities. The notes were paid at or before maturity, by defendant, Elliott H., and a decree made vesting him with the title. In 1865, attachments issued against defendant, Elliott H., in favor of J. H. Weems and others, which were levied on said land, and the same was sold and bid off, at the Sheriff's sale, by said Weems, at the amount of his debt, and afterwards redeemed from him by Anderson, and then from Anderson by defendant, Carter, but no deed was made by the Sheriff to either of said parties, before the bill in this case was filed.

Complainant files her bill against Elliott H. Gass and Alfred Carter, claiming that when defendant, Elliott, her son, purchased the land, he purchased for her, and that she furnished the money with which the land was paid for; and, therefore, that she is entitled to the same, or at least so much thereof, as she paid for, by way of resulting trust; she calls upon defendant, Carter, to produce and file the record, by which he claims title to the land.

Defendant, Elliott, makes no answer, and the bill as to him is taken for confessed. Defendant, Carter, answered, and denies that his co-defendant, Elliott, purchased the land for complainant, or that she paid any portion of the purchase money, and insists that she has no claim, legal or equitable, to the land. He says that the creditors of defendant, Elliott, attached the land, had it sold, and that the same was purchased by Weems, one of the creditors; that it was redeemed from him by Anderson, another creditor; and then that it was redeemed by himself as creditor; but he fails to produce

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the record of the judgment under which the land was sold, or the judgment of any of the redeeming creditors, or his own judgments on which he claims to have redeemed; nor does he claim to have any deed from the Sheriff. All that he does produce, is a copy of a receipt of his own, filed with the Clerk of the Circuit Court of Greene county, showing that he paid the prior bids, amounting to about \$225; and that he then receipted defendant, Elliott, for a judgment against him amounting to about \$400. This receipt of his own, so filed with the Clerk, is all the evidence of his title.

The first question presented upon the pleadings, is whether defendant, Elliott, purchased the land for complainant, or for himself, or for both. On this question the proof is voluminous, and much of it irrelevant and incompetent, but after a careful examination of all the testimony that is legal, we are satisfied that the purchase was made by defendant, Elliott, for complainant and himself, in pursuance of a previous understanding to that effect between them. The next question is, how was the land paid for; whether with the money of complainant in whole or in part? On this question the evidence is entirely satisfactory that at least as much as one-half of the price, that being the first note, was paid by defendant, Elliott, with complainant's money. She is shown to have received more than that amount from her father's estate about the time the first note was paid. He is shown to have lived with complainant, to have had charge of her business and her papers and her money, she being old, speechless from paralysis, and of weak intellect. The evidence does not satisfy us that

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the other half of the purchase money, that being the second note, was paid with her money, though the proof tends to that conclusion. It follows, that when defendant, Elliott, took the title to the whole tract in his own name, he held at least the one-half thereof as trustee for complainant; and upon this state of the facts as against defendant, Elliott, she would be entitled to relief to the extent of the land paid for by her.

But it is insisted for defendant, Carter, that some time after defendant, Elliott, obtained the title to the land, complainant recognized his title to the whole tract, by agreeing to buy from him about two hundred acres thereof, and that he executed to her a bond for title, when she should pay therefor; and it is further insisted, that after she had failed to make the payment for the two hundred acres, the bond was abandoned and canceled, and that she agreed to take, and did receive, his note for \$325, the amount she had paid to him on the land, and that defendant, Elliott, afterwards paid off and took up said note. If these allegations are sustained by the proof, they are fatal to complainant's claim for relief.

Complainant alleges in her bill, that shortly after defendant, Elliott, purchased the land, he executed his bond to make complainant a title to about two hundred acres of the land, in consideration of her money used in said purchase; that this bond, by some means unknown to complainant, has been lost or destroyed. In answer to this allegation, defendant, Carter, says that he did hear that said Elliott agreed to sell his mother a portion of said land, and that some writings were drawn—a bond and a note; and he heard, also, that they had been

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abandoned. The draftsman of the bond was examined as a witness, and he certifies that, in 1854, he wrote the bond, from Elliott Gass to his mother, to make her a title to a portion of the land, and that she executed her note to him for the purchase money. He thought the amount was about \$400; that there were two witnesses to the bond, but he could not recollect whether there were witnesses to the note. He saw nothing unusual in complainant's condition at the time.

In order to determine, whether the bond was executed, as alleged by complainants, as an acknowledgment of defendant Elliott's obligation to convey to her a portion of the land, in consideration of the money paid by her towards its purchase, or whether it was a purchase by her from defendant, Elliott, as testified to by the witness, it becomes necessary to look closely to the relations of the parties, and to the facts and circumstances which occurred soon after the bond was executed. It is in the proof, that the parties lived together, and that defendant, Elliott, had charge of all his mother's business. He had control of her papers and of her money. The most intimate fiduciary relations are shown to have existed between them.

It is in proof that, on the 12th of January, 1850, complainant received of the administrator of her father's estate, \$400; on the 6th of February, 1850, she received \$200, and on the 25th of September, 1862, she received \$60. It is in proof that, on the 31st of July, 1850, defendant, Elliott, paid \$200 on the first land note, and on the 6th of October, 1850, he paid the balance, about \$165. On the 15th of October, 1851, he paid \$306

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on the second note; and, within a few days, he filed complainant's receipt for her distributive share of the second instalment from the land sale, for \$59, which satisfied the second note. It is also in proof that, in 1858 and 1859, complainant received, for her distributive share of other lands sold, \$904. It is thus shown that, at the time the first land note was paid off, complainant had the money more than sufficient to pay it; whilst the proof is abundant, that defendant, Elliott, was a young man without means, except one or two horses; living with complainant, and having the control of her business and her means. In addition to all this, it is in evidence, by the members of the family, white and colored, as well as by others outside of the family, that defendant, Elliott, admitted, repeatedly, for years, and as late as 1861, that he paid for the land with complainant's money. The conclusion is irresistible, that, when the bond was given by defendant, Elliott, he was indebted to complainant for her money, used in paying for the land, at least as much as the first land note, and \$59 on the second note, and that whatever was the form of the transaction as to the bond, the substance of it was, that defendant, Elliott, was to convey to complainant about two hundred acres of land, on account of her money having been used in its purchase and payment. This conclusion is strengthened by the fact, that no such note as that referred to by the witness is ever afterwards heard of or referred to. But it is next insisted, for defendant Carter, that the bond was soon afterwards abandoned by complainant, and that she took defendant, Elliott's, note for the amount she had advanced towards

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paying for the land; and that said note was afterwards paid off and taken up by him. To sustain this ground of defense, the following receipt of complainant is relied on:

“Received of Elliott Gass, one note of hand for three hundred and twenty-five dollars, in full of a claim that Hyla Gass paid me on a bond that I executed to Hyla Gass, for a portion of the land where I live, including the house and spring; but as she failed to pay the calls of the bond, I considered the bond null and void. I give my note for the money that I got of Hyla Gass; and if the bond is ever found, this is to show that it is to be null and void. Given under my hand this 22d of June, 1855. Signed by Hyla Gass, (her mark,) and witnessed by Stephen Ailshire.”

This paper was written by the same witness who wrote the bond, who says that he does not know whether it was read over to complainant or not. He proves, also, that he wrote the note for \$325; but he does not know that complainant was present, or that it was delivered to her. He states that the note bears its true date, viz: March 10, 1854, which is more than a year before the bond was dated.

It is apparent that, although the receipt is signed by complainant, it speaks all the way through in the language of defendant, Elliott. It is an acknowledgment by defendant, Elliott, that when he executed the bond, he also executed a note for \$325, for money he got from complainant to pay for the land. The note bears date in 1854, when the bond was executed; and this, most probably, is the note referred to by the draftsman

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of the bond, as a note of complainant. This establishes our conclusion as to the character of the bond transaction. The note then executed was by defendant, Elliott, and not by complainant, as stated by the draftsman of the bond. The receipt proceeds: "But as she failed to pay the calls of the bond, I consider the bond null and void." This is the language of defendant, Elliott; and to make it binding on complainant, by way of estoppel or otherwise, it was incumbent on defendant to show that it was read to her, and that she signed the paper with an understanding of its terms. Neither the draftsman of the receipt nor the witnesses thereto, state that the paper was read to complainant; and there is no proof that she could read or write. In view of the relation existing between the parties, it was essential that it should appear distinctly, that defendant, Elliott, explained fully to her the purpose and object of the paper, to make it obligatory on her. As this was not done, either by defendant, Elliott, or the draftsman, or the witnesses to the receipt, it can not have the effect of annulling the bond. It remained in full force, and although lost, it could be enforced in a court of equity.

But it is next insisted for defendant, Carter, that the note of \$325 was afterwards paid by defendant, Elliott. To establish this ground of defense, the note is adduced with four credits on it, amounting in all to \$372 the first dated July 12th, 1858, for \$290, and the others dated in 1861 and 1863. The first credit is proven by the same witness who drafted the bond and note; he does not know that the note was ever in complainant's

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possession; he indorsed the receipt on it at the request of Elliott and John Gass; saw no money paid; this credit was for \$290; does not know that complainant was present. The only proof as to the two next credits, is, as to the hand-writing in which they were indorsed. These two receipts amount to \$78. The fourth receipt amounting to \$43, was proved by Etter, to be in his hand-writing; that the note was handed him by Elliott Gass' wife, and he entered the credit, and saw the amount paid in Confederate money, to complainant. It is to be remembered, as already stated, that about the date of the first credit of \$290, complainant received \$904, the amount of her distributive share in the real estate. It may be further remarked, that on two distinct occasions, after the date of the receipt for \$290, defendant, Elliott, is proven to have admitted distinctly that the land was paid for with complainant's money. In ordinary cases, where the parties are strangers, and are fully competent to contract, and dealing at arm's length, this proof might be sufficient to establish the defense. But defendant, Elliott, was the trusted son and confidential agent of complainant. He held and controlled her papers and her money. She was old, paralyzed and speechless, and of weak understanding. A court of equity scrutinizes with jealous vigilance the transactions between parties so related. It not only requires the utmost good faith on the part of the agent, but he is bound to show clearly and distinctly, that he withheld no information, and that the transaction was fully comprehended and freely assented to by complainant. Story Eq., § 321. Tested by this stringent, but

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just rule, we are constrained to conclude that the defense is not made out. There is no satisfactory proof that the note was ever in possession of complainant, or that she ever saw it, except when the last payment of forty-three dollars, in Confederate money, was made, and it does not appear that she then knew it was her note that was credited. The first credit of \$290 was made just about the time that complainant had received \$904 from the Clerk and Master. It was incumbent on defendant to show, that Elliott Gass did not use complainant's own money in getting this credit placed on his note. Viewed in connection with other transactions already referred to, the history of this note, and the credits on it, is involved in too much suspicion, to defeat the relief sought by complainant, unless the suspicious circumstances had been clearly explained; and this not having been done, we hold that, as against defendant, Elliott, complainant is entitled to so much of the land as was embraced by the bond.

The last ground of defense, is, that defendant, Carter, is an innocent purchaser of the land for valuable consideration, and without notice of complainant's prior equity. This defense is not made either by plea or in the answer, as required by law, nor is it sustained by the proof. Although called on by complainant's bill to exhibit his title, he fails utterly to adduce either the judgment by attachment on which the land was sold, or the judgments of either the first or second redeeming creditors. Nor does he show his own judgments on which he claims to have redeemed, nor the receipt of his immediate assignor for the payment of the claim,

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nor any evidence, by deed or otherwise, from the Sheriff of his being entitled to the land. All that he does exhibit is his own receipt filed with the Clerk of the Circuit Court, reciting the sale, purchase and successive assignment; all which, unsupported by the evidence of the various judgments, communicate to him no such title as enables him to rely upon the defense of an innocent purchaser for value. At most, he only acquired the equitable title of the original creditor and purchaser, and this being subsequent to the equitable title of complainant, must be postponed to her's, as to that portion of the land covered by the bond from defendant, Elliott, to complainant. 1 Hum., 491; 6 Hum., 99; 10 Hum., 9; 3 Sneed. 242.

The decree of the Chancellor will be reversed, and a decree rendered divesting out of defendant, Elliott, all his title to that portion of the land covered by the bond, as appears from the proof, and vesting the same in the heirs of complainant. The title claimed to said portion of the land by defendant, Carter, is declared null and void. The costs of this court and the court below will be paid by defendant.

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GEORGE W. SUSONG v. JOSEPH A. WILLIAMS and
CATHARINE WILLIAMS.

1. VOLUNTARY CONVEYANCE. *Reconveyance. Rights of creditors of Grantee.*
Where a mother conveys property to a son by registered deeds, reciting as a consideration, a moral obligation to convey, but in fact upon secret agreement of grantee to reconvey to the grantor, when peace should be re-established, the motive of the grantor being fear of confiscation; the reconveyance being made, a party who had dealt with the son on the faith of his apparent property before reconveyance, was held entitled to subject the property to his debt. Such a conveyance is valid between the parties, and the reconveyance being without a consideration, is void as to creditors of the son.
2. SAME. *Recitals in Warranty.* In a conveyance, the recital that the grantor holds the estate in a specific mode, is not an indication of an intent to convey what interest is so held, and exclude an interest otherwise held, such as will control express words of conveyance and general warranty. Warranty is an estoppel.
3. STAMPS. *Conveyance. Agreement.* A conveyance without pecuniary or valuable consideration, did not require a conveyance stamp, but an agreement stamp merely.
4. SAME. *Instruments made within Confederate lines.* An instrument made within the Confederate lines is not void for want of a stamp.†
5. APPEAL. Appeal has no effect as to party not appealing.

FROM GREENE.

Appeal from the decree of S. J. W. LUCKY, Ch.,
in the Chancery Court at Greeneville.

McFARLAND and McKEE, for complainants, on estoppel by warranty, cited *Henderson v. Overton*, 2 Yer., 394. False recital in deed estops grantor, *Gibbs v.*

†See *Sporrer v. Eifer*, post 633.

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Thompson, 7 Hum., 179; *Peacock v. Tompkins*, Meigs, 317. Insisted that a conveyance to avoid confiscation was a fraud, not a lawful trust.

R. M. BARTON, for defendant, Catherine Williams, insisted that the reconveyance of J. A. Williams was good against all creditors who had not a judgment lien at its registration, citing *Embry & Young v. Robinson*, 7 Hum., 444; *Sharp v. Caldwell*, 7 Hum., 415; *Chester v. Greer*, 5 Hum., 26, 34; 1 Sto., Eq. Jur., § 372; 2 *Id.*, 1372, 1377a. Mrs. W. did not participate in any fraud of J. A. W. on his creditors. *Peck v. Carmichael*, 9 Yer., 325. As to trusts in conflict with recitals of deed, he cited 7 Hum., 415; *Dudley v. Bosworth*, 10 Hum., 9. Want of a sufficient stamp, *Miller v. Morrow*, 3 Cold., 587. He admitted that the warranty passed the estate of Mrs. W. by estoppel.

NELSON, J., having been of counsel, did not sit in this cause; SHIELDS, Special J., sitting in his place, delivered the opinion of the Court.

This bill was filed in the Chancery Court at Greeneville, for the purpose of establishing a claim, growing out of an alleged fraudulent transaction with a Government voucher, against the defendant, Joseph A. Williams, and for the further purpose of having declared void, as against the complainant, a conveyance made by the said Joseph A. Williams to his co-defendant, Catharine D. Williams, and the land so conveyed subjected to the satisfaction of said claim.

The Chancellor held, the defendant, Joseph A. Wil-

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liams, was liable to the complainant in the sum of eight hundred and five dollars, and so decreed, which decree remains in full force and effect, no appeal from the same having been prosecuted. The Chancellor also held, that the conveyance was void as against the complainant, and decreed that a sufficient portion of the land so conveyed, to satisfy the amount of said decree against Joseph A. Williams, be sold for that purpose, from which decree Catharine D. Williams prosecutes an appeal to this Court.

It appears that, on April 25, 1864, Catharine D. Williams, who was the mother of Joseph A. Williams, conveyed to him a very valuable tract of land, situated in Greene county, known by the name of the "College Farm." This conveyance contains the following recital:

"Whereas, by virtue of the power in me vested by the last will and testament of my husband, Alexander Williams, devising to me the title absolute in fee simple to all his estate, etc., leaving the same absolutely at my disposal; and whereas, in discharge of the trust committed to my hands, I feel it to be my duty to distribute the same equally among my children and heirs at law, the same being the children and heirs at law of the testator. Now, therefore, in part compliance with what I believe to have been the spirit and intention of said last will and testament, I do hereby transfer and convey," etc.

The conveyance also contains a covenant of general warranty of title, and was duly registered in Greene county, on April 26, 1864.

It seems that Mrs. Williams, although her late hus-

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band had devised the said land to her, as recited in her said conveyance, in fact, held the same under the law of descent, as heir at law of her father, who, many years previous to that time, had departed this life.

Some time after this conveyance was made and registered and in the latter part of the year 1864, or early in 1865, the transaction occurred between the complainant and the defendant, Joseph A. Williams, out of which the demand of the former against the latter, grew. It is unnecessary, as Joseph A. Williams submits to the decree against him, to encumber this opinion with a statement of the nature and particulars of said transaction. It is sufficient to say, that in one contingency, which afterwards actually happened, it involved the element of credit given and extended to said Joseph A. Williams, by the complainant.

At a still later period, to-wit: May 15, 1865, the said Joseph A. Williams re-conveyed the same tract of land to his mother, reciting as a consideration therefor, that the former conveyance to him was with the distinct understanding and promise on his part that if, when peace was made and civil order was restored, his mother should so desire, he should re-convey, and she being now dissatisfied and desiring the re-conveyance, he, therefore, in accordance with his said promise, makes it.

It is this re-conveyance which the bill seeks to have set aside.

The circumstances under which these two conveyances were made, and the motives, designs and purposes of the parties making them, fully appear in the record.

Mrs. Williams was in sympathy with the South, and

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it may be by such overt acts as she was capable of performing, a rebel; and was apprehensive that her large and valuable estate would be confiscated. Her son, the defendant, Joseph A. Williams, professed to be loyal to the Government of the United States, and seems to have been so considered.

The witness, Dr. S. P. Crawford, who was the family physician, and being a lawyer, was also the legal adviser of Mrs. Williams, states that Joseph A. Williams paid nothing for the land; that he and witness insisted that the conveyance should be made; that finally Mrs. Williams reluctantly made the conveyance, with the express understanding that if the reports about confiscation should prove false, and the other children were not satisfied, that a re-conveyance should be made. And it is further proved by this witness that, after the danger of confiscation was over, and on dissatisfaction being expressed, Joseph A., with much persuasion and under a threat of litigation, was induced to re-convey the property to his mother.

It is insisted in behalf of Mrs. Williams, that the conveyance made by her to her son is void, and this for several reasons:

First. That at the time she made the conveyance she was of unsound mind. It is true that she was laboring under much mental depression, resulting from recent sickness, advanced age, and apprehension of confiscation of her property; but we are of the opinion that the testimony shows, that she was fully competent to make a binding contract. Nor do we think that there is evidence in the record to show that her co-defendant exer-

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cised such undue influence over her mind as, in law, to render the conveyance void. She was under the protection of her confidential legal and medical adviser, who, we think, exercised more influence over her mind in this transaction than did the son. It is entirely clear to our minds, that her sole object in making this conveyance, was to escape the apprehended sweeping desolation of confiscation, and that but for this she would not have made the conveyance—an apprehension which, at the time, was not without foundation; and it is equally as clear, that the motive assigned in the recital to the deed was not operative on her mind at all, as the subsequent re-conveyance fully proves.

Second. That as the preamble of the conveyance recites that she held under the will of her husband, and as she, in fact, did not hold as the devisee of her husband, but as heir at law of her father, it is to be taken she conveyed only such interest as she held as devisee, which was nothing. If she had expressly, and in terms, conveyed such estate as was devised to her, there would be some force in this argument. But such is not the fact; and the conveyance containing a general warranty of title, she is estopped from denying the title of the warrantee. Rawle on Cov., 394; *Henderson v. Overton*, 2 Yer., 398.

Third. That the conveyance, and the collateral agreement to re-convey on the happening of certain events, taken together, constituted in law but a trust, which could not be subjected to the payment of the debts of the trustee. But it abundantly appears, that the prime motive was to avoid confiscation; and we do not think that there was any intention to create any trust, as is

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now argued. The fact that the conveyance was made to defeat the confiscation of the property, is very far from rendering the deed void as between the parties, for obvious reasons; and the conveyance of April 25, 1864, operated to vest the title in Joseph A. Williams; and the subsequent re-conveyance, under the facts and circumstances of this case, must be held to have been made without consideration, and was fraudulent, by construction, against existing creditors—*Smith v. Greer*, 3 Hum., 118, 121; *Nicholas v. Ward*, 1 Head, 323—if not in fact.

Again, whatever may have been the private and secret agreement between the parties, express or implied, Mrs. Williams, by making this conveyance to her son valid and effective on its face, and permitting the same to be registered, thereby held her son out to the world as the owner of the property, whereby he was enabled to obtain credit.

On familiar and sound principles of equity jurisprudence, she is now estopped to deny his title and assert her own, to the prejudice of persons who extended credit on the faith of such ownership. A party who enables another to commit a fraud, is answerable for the consequences. 1 Story Eq., § 384.

But it is further insisted, that, as the conveyance of April 25, 1864, was not stamped, it is utterly void, and communicated no title to Joseph A. Williams. This is substantially a deed made without valuable consideration, and it was not necessary that it should be stamped with conveyance stamps. But every agreement or writing, not otherwise specified, is liable to a stamp duty

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of five cents on every piece of paper on which it is written. Now is this deed an agreement or contract within the meaning of this law? If so, what is the legal consequence? We are of the opinion, that in answer to the first question, we must hold that the instrument is an agreement or contract, within the meaning of the Act of Congress. But in view of the fact which we judicially know, and which also appears in proof, that the revenue law of the United States, by reason of the military force of the Confederate States, was excluded from enforcement at the time and place when and where the said contract was made, and that it was impossible to comply with the law requiring such instruments to be stamped, we can not hold, even if the assumption contained in the proposition of the defendant be well founded, that the failure to stamp the deed so affected its validity, as a muniment of title, that it vested no estate in Joseph A. Williams. On the contrary, we think that the circumstances excuse the failure to comply with the requirements of the law, which by reason of a permanent force hostile to its operation, and maintaining, in fact, another and different system of taxation, could not possibly have been executed, or even submitted to, by the most willing and loyal. Such a holding would carry havoc and ruin into the contracts and titles of twelve millions of people, made and acquired during a period of four years.

Affirm the decree.

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PETER SPORRER v. NICHOLAS EIFLER *et als.*

1. FRAUDULENT CONVEYANCE. *Relationship.* Relationship between parties to a conveyance, is a circumstance not of itself evidence of fraud.
2. MISTAKE IN DEED. *Stamps. Deed valid without. Evidence without.* A note given to A, secured in a deed of trust, to B, by mistake, deed might be reformed. United States revenue stamps are not essential to the validity of a deed, nor to its admissibility as evidence in a State court.
3. STATES, SOVEREIGN. *Congress. Powers of.* The States alone have power to regulate contracts amongst their own citizens, and to prescribe the rules of evidence in their own courts.

FROM KNOX.

In the Chancery Court at Knoxville, O. P. TEMPLE,
Ch., presiding.

CROZIER & SONS, for complainant.

T. R. CORNICK, J. R. COCKE, and L. A. GRATZ,
for respondents. The former cited 97 Mass. R., 150;
50 Barb., 302; 40 Ala., 470, 475; 9 Int. Rev. Rec., p.
21, column 3. Mr. GRATZ cited *Hunter v. Cobb*, 1
Bush, 239, from 3 Am. Law Rev., 484; *Carpenter v.*
Snelling, 3 Am. Law Rev., 356; *Holyoke Mach. Co. v.*
Franklin Paper Co., 97 Mass., 150; *Vonbeck v. Roe*, 50
Barb., 302; *Blount v. Bates*, 40 Ala., 470, 475.

TURNEY, J., delivered the opinion of the Court.

The decree of the Chancellor must be reversed.

A bill was filed by complainant in the Chancery

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Court of Knoxville, to set aside two deeds of trust for fraud. The suit is abandoned, as to the first deed. The second deed, which is attacked, was made 17th of August, 1866, embracing the property conveyed by the first deed, and conveys additional property providing for the payment of a debt of fifteen hundred dollars, cared for in the first deed, and securing, amongst others, a debt due to Mrs. Eifler, the mother of Nicholas, in three notes, amounting to about \$4,675, without interest.

The grounds insisted on by complainants are, that Mrs. Eifler is the mother of the maker; that one of the notes, written in German, is made payable to Mrs. Scherf, the sister of Nicholas, but secured to Mrs. Eifler; that the bill expressly charges fraud; that there is, in fact, no consideration for the notes, and that they were made to relations to hinder and delay creditors; that Mrs. Eifler and her son conflict in their statement of the consideration; that the deed has not the proper amount of revenue stamps.

The relationship of the parties may be considered, on an inquiry into the motives prompting the maker of the deed; it is merely a circumstance that may or may not be a badge of fraud, but unless well supported by other proof, is no evidence of a fraudulent purpose. The fact that one of the notes is payable to the sister, may be disposed of by the same remark. This is explained in the answer in the responsive statement, that the note was written in German; that Mrs. Eifler and her children are poorly acquainted with the English language, and thereby led the draftsman of the deed into

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error. This is the legitimate meaning of the answer, and it is sustained by the facts.

The mistake of the name in the deed is one for which a Court of Chancery would reform, by declaring it to be for the benefit of Mrs. Scherf, to the amount of her note. As to the discrepancy in the answers, we are unable to see that it exists in fact. Mrs. Eifler says the consideration of the note is loaned money. Nicholas says it was, he might say, loaned money, but states the facts to be, that he borrowed some money of his mother, and she sent him goods, for which he paid; he executing his note, including the money loaned, and the money advanced for goods—the one stating directly, and the other circumstantially, that it was loaned money, the results being identical. No proof is adduced on either side, as to the consideration. It was not necessary for the respondents to make any, after their direct denial, until complainant had first proven some act or fact conducing to show fraud.

It is insisted in argument, that, as two of the notes bear interest at ten per cent., therefore the deed is void. This fact only appears by exhibition of the note to the answer. There is no allegation that they are invalid for that cause.

This could not in any event, affect the deed, except as to the notes bearing the unlawful interest; and, in the view we take of the case, cannot affect it as to them further than the excess of the usury. Complainants, and not Mrs. Eifler, are the moving actors in the suit; and, if the original consideration is as claimed, loaned money, and there appears no fraudulent purpose

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to hinder and delay creditors, complainants, as to the notes, stand as would have stood Nicholas Eifler, were he asking the aid of a Court of Chancery to have said notes delivered up and cancelled. Nicholas being insolvent, and having made a deed in trust, this fund belongs to one or the other set of creditors. The party bringing the suit, and claiming to be entitled to it, must come under the rules governing, in case Nicholas were suing.

The complainants, for one ground, resist the right of Mrs. Eifler, because a statute makes void, contracts carrying more than six per cent. In discussing this question, Judge Story, in his work on Eq. Jur., § 301, says: "In cases of usury, this distinction has been adopted by courts of equity. All such contracts being declared void by the statute against usury, courts of equity will follow the law in the construction of the statute. If, therefore, the usurer or lender come into a court of equity, seeking to enforce the contract, the Court will refuse any assistance, and repudiate the contract. But, on the other hand, if the borrower comes into a court of equity, seeking relief against the usurious contract, the only terms upon which the Court will interfere are, that the plaintiff will pay the defendant what is really and *bona fide* due to him, deducting the usurious interest; and if the plaintiff does not make such offer in his bill, the defendant may demur to it, and the bill will be dismissed."

The ground of this distinction is, (says the author) "that a Court of Equity is not positively bound to in-

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terfere in such cases by an active exertion of its powers, but has a discretion on the subject, and may prescribe the terms of its interference; and he who seeks equity at its hands may well be required to do equity; and it is against conscience that the party should have full relief, and at the same time pocket the money loaned, which may have been granted at his own mere solicitation, for then a statute made to prevent fraud and oppression, would be made the instrument of fraud. But in the other case, if equity should relieve the lender who is plaintiff, it would be aiding a wrong doer, who is seeking to make the Court the means of carrying into effect a transaction manifestly wrong and illegal in itself.

Applying these principles to the case in hand, complainants being the movers, and substituted to the rights of Nicholas, can only be relieved to the extent of the usurious interest.

Upon the question of the sufficiency in amount of the stamps affixed to the deed, if the acts of Congress declaring, "That it shall not be lawful to receive any instrument, document or paper required by law to be stamped, unless stamps of the proper amount shall have been affixed and cancelled, and declaring such instrument void, and that they shall not be used in evidence, is the law," then this deed in trust is void.

The several States of the Union became entitled on the 4th July, 1776, to all the rights and powers of sovereign States, as respects their internal regulations. *McIlvaine v. Cox*, 4 Cr., 209.

The States are sovereign within their own limits,

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and foreign to each other, regarding them as local governments. *Bank U. S. v. Daniel*, 12 Pet., 33.

The rights of the crown devolved on the States by the revolution, and were confirmed to them by their treaty of peace in their sovereign capacity. Bald., 60.

The provision of U. S. Stat., of 1866, that no document not duly stamped, shall be used as evidence in any court, until the requisite stamps shall have been affixed thereto, applies only to the courts of the United States. *Carpenter v. Snelling*, 97 Mass, 452; *Lynch v. Morse, Id.*, 458.

The courts of the States do not exist by the authority of the United States, or by its permission, and are not objects over which its sovereign power extends, except, *perhaps*, for the purpose of protection. It does not possess over them, even the incidental power of taxation.

The people of the States possess all the powers of their original unlimited sovereignty, except such as have been delegated by them to the Government of the United States, or are prohibited to the States by the Constitution. *Union Bank v. Hill et als.*, 3 Cold., 325.

There has been no delegation by the States to Congress, of power or authority to legislate for the internal regulation of the States, nor are the people of the States prohibited by the Constitution from creating and regulating the courts of the States and declaring the rules for their government. The Legislature of the State is the only power which can enlarge or contract the rules of evidence or create and enforce new rules in

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the courts of the State. If Congress may, by its enactments, make or change the rules of evidence as applicable to the courts of the States in any one particular it may in all things. It may totally abolish existing rules of evidence and practice and substitute others new and wholly different. If it may say what shall and shall not be a muniment of title, as it has proposed to do in the acts in review, it may as well prescribe the qualification for officers of the State, created by the Legislature of the State. In short, there is no limitation to its powers of legislation for the States, for each, according to its political complexion, and the favor or disfavor of Congress. From such Congressional interference, consolidation and centralization must ensue, the rights of the States be destroyed and their sovereignty exist only in history.

It follows, stamps are not necessary to the validity of a paper as a muniment of title nor to its competency as evidence in the courts of the States.

The Chancellor declared the deed void. His decree is reversed, and the bill dismissed.

JOSEPH KEELER v. JAMES BAKER.

CONTRACT. *For subsistence at contractor's house. Removal. Compensation.*

Complainant, owner of lands, made a deed for the land to a son-in-law, the defendant, in consideration of moneys to be paid, and in consideration that the son-in-law would support the grantor at his house

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during life, "should he choose to remain there." The grantor voluntarily left the house of the defendant. Held, that the defendant should account for the actual outlay of which he was relieved by the removal of complainant.

FROM SEVIER.

In the Chancery Court at Sevierville, O. P. TEMPLE, Ch., presiding.

R. M. BARTON & E. C. CAMP, for complainant.

J. P. SWANN & A. CALDWELL, for respondent.

DEADERICK, J., delivered the opinion of the Court.

The bill in this case, was filed in the Chancery Court at Sevierville, 25th July, 1859, alleging that complainant, being about seventy years old, was induced, by the arts and contrivances of defendant, who was his son-in-law, to convey to him his tract of land in Sevier county, worth \$4,000, for the price of \$1,800; that complainant was weak in body and mind, had had domestic troubles, and had, for several days before the trade, been under the influence of liquor. The complainant alleges that the defendant "fraudulently took advantage of this state of facts to overreach him, and deprive him of his property."

The answer denies the charges in the bill, and alleges that the complainant proposed the trade to him; that he was in the full possession of his mental powers, made the contract voluntarily and understandingly, for a fair and sufficient consideration.

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The contract was reduced to writing by both the parties, and was executed on the 15th of September, 1853, nearly six years before the filing of the bill. It is witnessed by J. Walker and C. Inman. Walker died before the institution of the suit, and the deposition of C. Inman has been taken in the cause.

The record is very voluminous—presenting, in more than a hundred depositions taken, much conflict in the opinions of the witnesses, as to the mental capacity of complainant at or about the time of the execution of the contract.

By the terms of the contract, respondent was to pay complainant \$1,800—\$300 of which was to be paid in the fall of 1853; the balance to be paid in annual instalments of \$200, except the last payment of \$100. And the contract further stipulated, that said “Joseph is to make said Baker’s house his home, and he is there to be maintained during the lifetime of said Joseph Keeler, should he choose to remain there, free of charge.”

It is impracticable now, as well as unnecessary, to undertake an analysis of the testimony in the record, but we have given it a careful examination.

The complainant alleges, that he was persuaded to go to one John Walker’s, four or five miles from his home, to execute the contract, scarcely knowing, and not understanding, what he did, and was greatly affected by the influence of liquor, drank several days preceding the transaction. It is hardly alleged, and is not proven, that he was under the immediate influence of liquor when the contract was executed.

Charles Inman, the only surviving subscribing wit-

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ness to the contract, states that he saw nothing wrong in complainant's mind; that if he was drinking he did not notice it, and that he signed the contract voluntarily.

John Catlett, the only other person living who was present at the signing of the contract, and who drew part of the notes given by respondent, states, that so far as he could judge, complainant was as much in his right mind as he ever was—was perfectly sober, and entirely competent to transact said business; that complainant assigned, as a reason for selling his land to Baker, that all his children had married and left, and he was unable to keep up the place himself. The trade was freely spoken of, and both parties seemed to act with entire willingness.

There is also much evidence in this record to show that complainant preferred to live with his daughter, the wife of the defendant, and repeatedly expressed his purpose to sell his land to the defendant, for some time before the contract was entered into.

There is also testimony in the record to show that complainant, after he had entered into the contract with defendant, frequently expressed regret that he had done so, and often manifested deep concern and distress that he had parted with his land; while, on the other hand, and at other times, from the date of the contract up to within a short time before the filing of the bill, he repeatedly expressed his satisfaction with the arrangement he had made.

While it cannot be held that, in order to avoid a contract, it is necessary to prove that the party seeking to be relieved from it was insane, or of unsound mind;

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mere physical debility or the infirmities of old age, though they justly excite the vigilance of the courts, do not, without more, furnish sufficient reasons for avoiding a contract.

In this record, while we have the expression of opinion from many witnesses that complainant was not competent to transact important business, we think the weight of proof is that he had more than ordinary vigor of body and mind for his age, and that he perfectly comprehended the nature of the transaction with defendant, assigned a rational motive for it, and voluntarily and understandingly entered into the contract with him, and must be held to its performance.

In addition to the \$1,800 to be paid to complainant, defendant also undertook to maintain complainant during his life, should he choose to remain at his house, free of charge.

The complainant voluntarily left the house of defendant the day before the bill was filed; and, as far as this record discloses, without any sufficient cause.

Under these circumstances, we think the defendant should be charged with a reasonable annual allowance to complainant, computed upon the basis of what it would have cost defendant to maintain complainant at his own house, and not what it may have cost complainant to board. That inasmuch as defendant has, by the absence of complainant, been relieved from the actual expense he would have incurred for his maintenance, if he had remained with him, he shall be required to account to him for that amount.

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Decree of Chancellor affirmed, with this modification thereof as to the account ordered. The costs in this Court, and the Court below, will be paid by complainant.

F. R. MARTIN *et als* v. JOSEPH H. MARTIN *et als.*

1. RESCISSION. *Fiduciary relation. Burden of proof imposed by.* A son employed by a father to procure a deed intended to defraud a wife of her dower, stands in such fiduciary relation, that having procured the deed to be drawn and executed to him and a brother, in exclusion of the other heirs, the father being at the time aged, infirm, and in a distressed state of mind, though capable of making a deed, and he having afterward made declarations making it probable that he had been imposed on—the sons will be held to strict proof of fairness and good faith in the transaction, and of a full comprehension by the father of its terms; or, in the absence of such proof, the deed will be set aside.
2. SAME. *Effect of one fraud upon another.* The deed having been set aside before, as to the wife, did not affect its validity as to the other children. But the specific intent to defeat the wife might enable the son to dictate the terms in other particulars, so as more readily to escape the observation of the father.

FROM WASHINGTON.

In the Chancery Court, at Jonesboro, H. SMITH, Ch., presiding.

HACKER & GRIFFITH, for complainants, cited 1 Sto. Eq., Jur., §§ 224, 236, 238; *Talley v. Smith*, 1 Cold., 290; 8 Hum., 145, on weakness of understanding. *Pay-*

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less v. *Williams*, 6 Cold., 440, as to confidential relations; and insisted that the relation of parent and child was such as to be within the rule.

W. H. MAXWELL, for respondent, cited and commented upon *Talley v. Smith*, 1 Cold., 290; *Keeble v. Cummins*, 5 Hay., 43; Med. Jur., Whar. and Settle, § 5, top p. 12; *Ib.*, § 35, p. 30; *Gibson v. Gibson*, 9 Yer., 332; *Van Alst v. Hunter*, 5 Johns, 148; *Rowland v. Rowland*, 2 Sneed, 543; *Gass v. Gass*, 3 Hum., 278; *Ford v. Ford*, 7 Hum., 92. He commented on *Bayless v. Williams*, 6 Cold., 440, and insisted that there was nothing in the relation of parent and child from which undue influence can be presumed.

NICHOLSON, C. J., delivered the opinion of the Court.

About the 1st of June, 1866, M. H. Martin conveyed all of his real estate, consisting of two tracts, one of two hundred, and the other of sixty acres, to his two sons, Joseph H. Martin and Madison Martin. The tract for 200 acres was conveyed to James H., for the consideration of one dollar, and in consideration that Joseph H., executed a bond in the penalty of \$2,000 for the support of his father during his life. The tract of 60 acres was conveyed to Madison for the consideration of love and affection. At the time of these conveyances, the said M. H. Martin had a wife, two daughters, and a number of grand-children, who, as well as Joseph H. and Madison, survived him. In August, 1866, the said M. H. Martin died. Soon

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after his death, his widow filed her bill for dower in the said lands, alleging that the conveyances were made to defeat her right of dower; and dower was allotted to her. Afterward, in May, 1869, this bill was filed by complainants, who are heirs of M. H. Martin, to set aside the conveyance aforesaid, for fraud.

The allegations of the bill are, that M. H. Martin was seventy-six years of age, enfeebled in body and mind, as well by disease as by old age; harassed and disturbed, in consequence of a recent separation from a second wife, to whom he had been but lately married; and that defendants, Joseph H. and Madison, took advantage of his weakness of mind and his domestic trouble, and procured him, by undue influence and fraudulent devices, to execute the conveyances. With evident indications of hesitancy and evasiveness, the main allegations of the bill are denied.

It is well settled that weakness of understanding must constitute a most material ingredient in examining whether a bond or other contract has been obtained by fraud or imposition, or undue influence; for although a contract made by a man of sound mind and fair understanding may not be set aside merely from its being a rash, improvident or hard bargain, yet if the same contract be made with a person of weak understanding, there arises a natural inference that it was obtained by circumvention or undue influence. 1 Story Eq., § 235. The doctrine, therefore, may be laid down as generally true, that the acts and contracts of persons who are of weak understanding, and who are thereby liable to imposition, will be held void in courts of equity, if the nature of

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the act or contract justify the conclusion that the party has not exercised a deliberate judgment, but has been imposed upon, circumvented or overcome with cunning, or undue influence. *Ib.*, § 238. In all cases of principal and agent, the former contracts for the aid and benefit of the skill of the latter; and the habitual confidence reposed in the latter makes all his acts and statements possess a commanding influence over the former. It is, therefore, for the common security of all mankind, that gifts procured by agents, and purchases made by them from their principals, should be scrutinized with a close and vigilant suspicion. Agents can not deal validly with their principals in any cases except where there is the most entire good faith and a full disclosure of all facts and circumstances, and an absence of all undue influence, advantage or imposition. § 315; 1 Cold., 290; 6 Cold., 440; 8 Hum., 145; 2 Head, 289; 6 Vesey, 268; 9 Vesey, 292; 8 Hum., 183. •

In determining the validity or invalidity of the conveyances attacked in the bill, we must be governed by the principles of equity jurisprudence just laid down. The record exhibits to us a transaction between father and sons. The father is seventy-six years of age. He has been the victim of rheumatism and dyspepsia for years. Eccentric to an extent that approaches lunacy, and subject to spasmodic attacks, which for the time, rendered him helpless and insensible. At the advanced age of seventy-five he marries a second wife, and in a short time domestic troubles arise which result in their separation. He is the owner of two hundred and sixty acres of land, and he has two sons, two daughters and

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several grand-children, the children of his deceased sons or daughters. Soon after his separation from his wife, harrassed and troubled in mind, whilst greatly enfeebled by age and disease, he conveys his entire real estate to his two sons, to the exclusion of his wife, his daughters and his grand-children. No reason whatever is given for thus cutting off his wife, though his object in so doing may be readily inferred from the fact that he had just separated from her. It does not appear that his natural affections had been in any degree alienated from his daughters or from the children of his deceased sons and daughters. Nor does it appear that he had any special cause for selecting his two sons as the sole objects of his bounty. We find in the record no explanation of this apparent disregard of the natural affections. Being the absolute owner of the property, M. H. Martin had the absolute right to dispose of it as he pleased, and none have a legal right to object or complain, provided he was at the time possessed of a sound disposing mind, and was free to act without fraud or undue influence.

This brings us to the controlling question: Did M. H. Martin, being of sound and disposing mind, execute the deeds freely and understandingly, or was he at the time impelled to make the conveyance by the fraud or undue influence of defendants, Joseph H. and Madison, or either of them?

We have no difficulty in seeing that the leading object of M. H. Martin, and of Joseph H. and Madison, was to defeat the wife of M. H. Martin in any claim to said lands, either by way of alimony or dower. It appears

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from the record, that immediately after the conveyances were made, the wife of M. H. Martin filed her bill for divorce and for alimony; that pending the suit the said M. H. Martin died, and that, upon the filing of an amended bill and the proper proceedings had, the Chancellor set aside the deeds, and allotted to the widow dower in the lands. In pronouncing his decree, the Chancellor states that, "it appearing to the Court that complainant and said M. H. Martin lived and cohabited together as husband and wife, happily, until their conjugal harmony was marred by the contrivances of the defendant, Joseph H. Martin; and that said contrivances culminated in the conveyance of the said M. H. Martin, to his sons, Joseph H. and Madison, of his entire real estate," thereupon he held that the conveyances were in fraud of the widow's dower right.

But it does not necessarily follow that because the conveyances were made in fraud of the dower right of the widow, therefore they were void as between the said M. H. Martin and sons, Joseph H. and Madison. The question still recurs, whether, in contriving to procure the said M. H. Martin to execute the deed to defeat the rights of the widow, the said Joseph H. also contrived to have the conveyance so made as to exclude all the other children and grand-children, except Madison and himself, from participation in the real estate; and whether, in so doing, advantage was taken of the imbecility, or the uneasy and disturbed state of mind, of his father.

In view of the facts that this was a transaction between the father and his sons, and that the father was

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very old and much enfeebled in body and mind, from age and protracted disease, and that defendant, Joseph H., was acting for his father in the transaction, and that he was at the time uneasy and troubled about his separation from his wife, it was incumbent on the defendants, Joseph H. and Madison, to show satisfactorily that it was the wish and purpose of the father to exclude all of his descendants except themselves, from the enjoyment of his property. No attempt is made to relieve themselves from this suspicious circumstance. It was the more incumbent on them to remove any unfavorable inference from this circumstance after complainants had proved by at least three witnesses that soon after the execution of the deeds the old man spoke of the papers he had executed as being "some thing like a will." One witness, Jane Gibson, proved that she saw her father the same day the witnesses and J. H. Martin came to town to have the deeds probated and registered. He told her he had made some thing like a will. About the same time, he said to Moses Moore "that they run under me at the shop the other day; I thought I was signing a will instead of a deed." The proof of like declaration at other times, is made by other witnesses. This evidence tends to excite doubt as to whether the old man really understood, when he executed the deeds, what their legal effect was; and it rendered it the more incumbent on Jos. H. and Madison, who had acted as his agent in having the deed written and witnessed, to explain by clear proof, that the old man was not imposed upon as to the character of the papers. The inference that we draw is that when the old man made the deeds

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his attention was absorbed by the leading idea of fixing his property beyond the reach of his wife, and that having confidence in his sons, and they having procured the papers to be drawn, and having brought them to him for his execution, he signed them, supposing that they were only a will in their legal effect.

It is in proof that the deeds were prepared privately by an attorney at his office in Jonesboro, in the presence of Jos. H. and Madison, and that the old man Martin was not present; the door of the office was locked whilst they were being prepared. It is in proof that the deeds were written some time in June, 1866, but that they were ante dated to September, 1865.

This fact is charged in the bill as evidence of fraud, and defendants called on to answer. The only response made is, that "as to the dates of the executions of the deeds and of their probates and registration, he neither admits nor denies, as said deeds are not on file; but being exhibited with the bill, refers to the dates thereof for legal evidence of said facts." This response is not only evasive, but it suggests that the deeds bear their true dates, which is clearly proven not to be true. Whether the deeds were ante-dated so as to show a date of execution prior to the marriage of the old man, with the hope thereby of defeating the wife's alimony or dower, or whether because, in September, 1865, the mental condition of the old man was better than in June, 1866, it is left to conjecture. But, taken in connection with the evasive answer, the conclusion is irresistible that the deeds were ante-dated for some purpose, which defendant, Jos. H., deemed it best not to explain.

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After the deeds were prepared, they were taken by Jos. H., and in the course of three or four days, he met with Mr. Shipley on the public road and asked him to go with him to M. H. Martin's blacksmith shop and witness the deeds. He did so, and on the next day he and the other witness, young Michael Martin, in company with Jos. H., went to town and proved the deeds. This was in June, 1866. Witness Shipley says he read the deeds over in the hearing of the old man, and he talked sensibly about some of the old corners and lines of the deeds. Witness thought the old man was in his proper mind. The other subscribing witness being dead, was not examined. Several other witnesses testify, that in June, 1866, the old man's condition of mind was so enfeebled and disturbed that they could not regard him as capable of making a valid contract. They detail instances of eccentricity, both in his actions and conduct, which look very much like the talk and conduct of one partially deranged. But, upon the whole, we conclude that, at the time the deeds were executed, he had sufficient capacity to make a valid contract, if his mind was free from excitement, and uninfluenced by fraudulent appliances or devices. The proof is abundant that, for some time before the deeds were made, he was uneasy and disturbed on account of the separation from his wife.

It is also in proof, that, at that time his health was much impaired. His uneasiness and disturbance of mind were evidently produced by his apprehension that his wife might become entitled to a portion of his land. In this condition his son, Joseph H., came to

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his relief. He becomes his agent to defeat the consequences which were disturbing him. He applies to a lawyer, and has the deeds prepared. There is no evidence that this was done at the request of the old man, or that the old man even knew what was being done by his son. He has the deeds drawn covering all the land, and much the largest share is to be conveyed to himself. At the same time, he has a bond drawn, to be signed by himself, by which he agrees to support his father, and this is made the main consideration of the deed. It is not shown that the old man even knew that such bond was to be prepared. It is in proof, that, after the deeds and bonds were executed and delivered, the old man said he had a bond on Joseph H. for his support; that Joseph H. had the advantage of him—that he might throw him out any day. This bond for support was part of the plan of Joseph H. for forcing the execution of the deed. At the age of seventy-six, and in the bad health of the old man, the bond with the penalty of \$2,000 was but a nominal consideration for the land. The old man lived only about two or three months afterward. It shows that whilst Joseph H. was arranging to defeat the old man's wife, he was also arranging for his own advantage. He procured the deeds and bond to be ante-dated, and then procured their execution. As he was the active agent in procuring the preparation of the papers, and in having them signed and witnessed, and as he was to be largely benefitted from the transaction, the law presumes from the relation of father and son, of principal and agent, that the latter had influence over the former.

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Express proof of influence need not be made, it is implied from the relation. But when to this is added that the father was far advanced in years, was greatly enfeebled in body and mind, actually verging upon mental incapacity, and was greatly troubled and uneasy in his mind, and that the son and agent uses his influence in procuring a deed which secures to himself more than two thirds of his father's entire estate, and to his brother the residue, to the total exclusion of two sisters and several grand-children, the law raises the presumption of fraud, and this presumption can only be overturned by clear and satisfactory proof that the son and agent dealt with entire fairness and good faith in the transaction. It is incumbent on him to show affirmatively, that his father comprehended fully, the purport and effect of the conveyances, and that he executed them freely and understandingly, knowing that he thereby divested himself of the absolute title of the lands, and that they would not operate merely as a will. No such proof is made or attempted to be made, and for that reason, the presumption of fraud must stand.

It follows that the Chancellor's decree will be reversed, and decree made giving the relief prayed for.

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RUFUS MCCLUNG, Adm'r, v. MARGARET MCMILLAN *et als*.

1. WILL. *Construction. Power of disposition.* A devise to a wife, to enable her to raise and educate children, of all the testator's property, real and personal, "to have, manage and use, during her natural life, and at his death to be divided among his children;" held not to give the wife an absolute estate.
2. SAME. *Same. Devise to a class.* A codicil being made to the above, providing that if the wife should die before the younger children are raised and educated, they should have an additional sum sufficient to raise and educate them; held, that the children under this will, did not take as a class with right of survivorship, but that a child left by a son who died before his mother would take the son's share.

Cases cited and distinguished: *Satterfield v. Mays*, 11 Hum., 58, and *Bridgewater v. Gordon*, 2 Sneed, 5.

FROM KNOX.

From the Chancery Court of Knox county, O. P. TEMPLE, Ch., presiding.

J. R. COCKE, for complainants.

BAXTER, for defendants.

An anonymous brief cites: 11 Hum., 58, *Womack v. Smith*; 11 Hum., 478, *Beasley v. Jenkins*; 2 Head, 191.

WASHBURN, for L. D. Alexander, cited: Jar. on Wills, 727; *Bridgewater v. Gordon*, 2 Sneed, 5; *Satterfield v. Mayes*, 11 Hum., 58; 5 *Doe v. Prevost*, 4 J. R., 65; *Wimple v. Fonda*, 2, J. R., 287; *Haywood's Heirs v. Moore*, 2 Hum., 584; 4 Cruise Dig., 166, § 44. To

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show that the widow took absolute estate, he cited: 2 Fearne, 50; 10 J. R., 18; 13 J. R., 537; 15 J. R., 186; *Smith v. Bell*, M. & Y., 302; *David v. Bridgman*, 2 Yer., 558; *Davidson v. Richardson*, 10 Yer., 290; *Booker v. Booker*, 5 Hum., 505; *Sevier v. Brown*, 2 Swan, 112.

NICHOLSON, C. J., delivered the opinion of the Court.

The bill in this case is filed by the administrator, *cum testamento annexo*, of the late Judge E. Alexander, praying for a construction of his will, and asking for instructions as to the execution of his trust. The will is as follows:

"First. It is my will and desire that any just debts I owe shall be paid speedily and promptly by my executor.

"Secondly. In order to enable my dear wife, Margaret, to raise and educate our children, I do give and bequeath to her all my property, both real and personal, to have, manage and use during her natural life, and at her death, to be equally divided among all my children. None of my property shall be sold without my wife's consent, and I do not desire a public sale of anything."

After appointing his wife his executor, he executed the will, and afterwards made a codicil, in the following words: "It is my will, that, if my wife should die before our youngest children are raised and educated, they shall be entitled to as much more than the other children, as will raise and educate them. This is to constitute part and parcel of my will."

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Testator died, leaving his wife and eight children surviving him. One of his sons, Charles Alexander, died, leaving an infant daughter, Lucinda D. Alexander. Afterwards the widow of testator died.

The question for our determination is, whether or not the child of Charles Alexander, deceased, takes any share in the estate of the testator.

It is maintained, in behalf of Lucinda D. Alexander that the widow, Margaret Alexander, took an absolute estate in the property, and hence, that Lucinda is entitled to a share of said estate, as an heir and distributee of said Margaret. The argument is, that the widow, by the terms of the will, is vested with the power of disposing absolutely of the entire estate, and hence, that the limitation over to the children was defeated. This consequence would certainly follow, if the widow had the unlimited power of disposal of the estate. But we can not concur in this construction of the will. It was clearly the intention of the testator to vest in his widow only a life estate; but, for the purpose of raising and educating their children, she was vested with discretionary power in the use and management of the property. These powers were vested in her, to enable her to effectuate the leading object of the testator, which was the raising and educating of their children. It was further the intention of the testator, that his widow should exercise her discretion, as to selling any of the property, or keeping it altogether; but if she should elect to sell any, he requires it not to be a public sale. There is no unlimited power of disposition intended by this direction of the will. He anticipated that it might be necessary

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to sell property, either to pay debts, or in raising and educating his children; and his object was to have such sale only with the consent of his wife, and then not publicly.

It is next maintained for the defendant, Lucinda, that, upon the death of testator, the interest in his estate vested in each of his children then living, as tenants in common, subject to the life estate of the widow. As the father of Lucinda was living at the death of testator, it is asserted that an interest in the estate vested in him, which, upon his death, was transmitted to her. If the position insisted upon is tenable, the consequence stated is inevitable.

On the other hand, it is maintained, for the other defendants, that the children of testator take under his will, as a class, and, therefore, that defendant, Lucinda, being a grand-child, and so not belonging to the class, could take no interest.

It is manifest, that, upon an ordinary limitation by way of remainder to children in a class, all who are in *esse* at the time of the death of the testator, take vested and consequently transmissible interests immediately upon testator's death. 2 Wms. Ex'rs, 937. But if there be words of survivorship in the will, which shows that the intention of testator was, that the children, living at the death of the tenant for life, shall take the entire estate, then, although the interest of each of the children was vested at the death of the testator, yet, such interest would not be transmissible upon the death of any child during the tenancy, for life; but such interest would go by survivorship to the children who

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survived the tenant for life; *Bridgewater v. Gordon*, 2 Sneed, 5.

So, in the case before us, upon the death of testator, his widow took an estate for life, and his children then living, took vested interests as a class, subject to the life estate. The son, Charles, took a vested interest, and that interest was transmitted to his daughter, Lucinda, upon his death, during the life of the tenant for life, unless it appears by the words of the will, that it was testator's intention that Charles' interest should survive to his brothers and sisters.

In support of the position that the interest of Charles survived, and was not transmitted, the case of *Satterfield v. Mayes*, 11 Hum., 58, is relied on. In that case the language of the will was: "I lend to my daughter, Betty Mayes, one negro girl named Letice, during her natural life; and, after her death, she and her increase to be equally divided between her daughters."

Judge McKinney, in his opinion, says: "Regarding it as a vested remainder, as we do, the question is, when and in whom does the interest vest? To which we answer, that it vests in the described class, as a class, and not individually in the persons composing such class; and the entire subject of the gift survives to and vests in the persons constituting such class, at the time when payment or distribution of the fund is to be made." The decision rests upon the construction of the words, "to be divided equally among her daughters;" and these words are construed to indicate the intention of the testator, that the interest should survive, and not be trans-

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mitted. It is only upon such construction of the words that the case could be taken out of the provisions of section 2010 of the Code, abolishing survivorship in joint tenancies, and converting them into tenancies in common.

But in the case before us, in addition to the words, "at her death to be equally divided among all my children," we have the following words: "If my wife should die before our youngest children are raised and educated, they shall be entitled to as much more than the other children as will raise and educate them." And it is maintained for defendant, Lucinda, that a proper construction of this additional clause takes this case out of the operation of the decision in *Satterfield v. Mayes*, and brings it within the rule laid down in the latter case of *Bridgewater v. Gordon*, 2 Sneed, 5.

The language of the testator, in the case of *Bridgewater v. Gordon*, was as follows: "At the death or marriage of my said wife, it is my will that my estate be equally divided between my children, share and share alike, having a just and equitable regard to such portions of property as may have been given to any of them by my wife, as afore mentioned, so that no one of them may receive more than another."

In giving the opinion of the Court, Judge Totten referred to the case of *Satterfield v. Mayes*, and said: "It seems to us that the principles of the case of *Satterfield v. Mayes* only apply in the case of an aggregate fund given to a class of persons as a unit, or who take a joint interest in the fund. But where an estate is given to A, for life, with a *several* and *vested* interest

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in remainder to her children, each of the children has a transmissible interest, and upon his death during the continuance of the life estate, such interest will go to his heir or representative, according as the estate is real or personal, unless, indeed, there be words of *survivorship* which show the intention to be, that the *children living* at the death of the tenant for life, shall take the entire estate." Upon the language of the will, "to be equally divided" between testator's children, "share and share alike," Judge Totten held, that "the children took a several interest in the estate in remainder, as tenants in common."

The distinction between the cases of *Satterfield v. Mayes* and *Bridgewater v. Gordon*, is by no means clear and palpable; but as we understand the principles on which they respectively rest, they are not in conflict. In the former case, the testator gave an aggregate fund to a class of persons as a unit, and who took a joint interest in the fund; each person of the class took an interest in the entire fund. That being so, the doctrine of survivorship was properly applied.

In the latter case, the testator gave an aggregate fund to a class of persons, but not as a unit, and they were not to take a joint, but a several interest. This is deducible from the authority given to a tenant for life to make advancements to those interested, and from the fact that, after the termination of the life estate, the advancements made were to be accounted for, and the estate divided equally, share and share alike, among the parties in interest.

We hold that a proper construction of the will of

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Judge Alexander brings the case before us within the principles which governed the case of *Bridgewater v. Gordon*. He gave to his wife a life estate; to his children he gave a remainder in an aggregate fund, which vested at the death of testator, and he gave it to them as a class, but not as a unit, and not to have a joint but a several interest, as tenants in common. We deduce this conclusion from the intention clearly conveyed, in providing for an equal division among his children; and in giving to his wife the power to use and appropriate the fund to the raising and education of all his children; which power necessarily implies that the fund might be appropriated by her in unequal proportions, for the raising and education of the several children, and also from the provision of the codicil, giving to the younger children not raised and educated at the death of his wife, as much more than the others, as would raise and educate them. These provisions are inconsistent with the assumption that the children took as a unit, having a joint interest in the estate. They took, therefore, as a class; but they took several interests as tenants in common, and each one took a vested interest, which was transmissible.

Our conclusion is, that the daughter of Charles Alexander is entitled to a share in the real and personal estate of her grandfather.

We reverse the Chancellor's decree, with costs, and remand the cause.

Wm. D. Trent v. Robert Kyle and J. W. Phillips.

WM. D. TRENT v. ROBERT KYLE AND J. W. PHILLIPS.

1. **VENDOR'S LIEN.** *On land not conveyed. For debt assumed.* A title bond, reciting that the maker had sold his land to the vendee for a stated sum, composed of items, one of which was "the assumption of a debt to W. D. T., now bid upon the land, to be paid 25th of December, 1863," and concluding with an obligation to make a title on the receipt of the last payment, held to create a lien for the payment of the note to W. D. T., he being a purchaser of the land at execution sale, who voluntarily permitted redemption at the amount stated as the sum assumed, for which he accepted the purchaser's note.
2. **SAME.** *Priorities between liens.* Where two join in a sale of real estate, securing a lien for purchase money, the relative rights to which they fail to ascertain, the law will give to him whose right is superior the priority of satisfaction. As where a party holding land under execution sale, with redemption expired, joined the execution debtor in a sale to a third person, the purchaser at execution sale was held to have priority.

FROM HANCOCK.

In the Chancery Court at Sneedville, SETH J. W. LUCKY, Ch., presiding.

W. R. EVANS, for complainant.

JAMES T. SHIELDS, for defendants.

R. MCFARLAND, S. J., delivered the opinion of the Court.

The complainant, Trent, had a judgment against the defendant, Robert Kyle, upon which an execution issued and was levied upon a tract of land of Kyle's, in Hancock county. The land was sold under this execution, on the 24th day of November, 1860, and bought by

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Trent, for \$766.76, the amount of his debt and costs. Kyle made an effort to redeem the land from Trent, with bank notes and Confederate money, but Trent refused to receive the same. Kyle, however, made arrangements with his co-defendant, John W. Phillips, by which the latter agreed to purchase the land for the sum of \$5,500. Out of this, Trent's debt was to be paid, and the balance was to go to Kyle; and this agreement was to be carried out, provided Trent would agree to it, and take Phillips' note for the amount due him. To this arrangement Trent consented, as he alleges in his bill, under duress, or from fear of Phillips, and, as he alleges, upon condition that the note to be thus taken should be secured upon the land.

On the 24th of December, 1862, a title bond was executed by Kyle, binding himself to convey the land to Phillips, upon the payment of the purchase money. Upon the same day, Phillips executed his note to Trent for \$869.10, due the 25th of December, 1863, in currency that "will pay debts in bank or taxes," with interest from date, this being the amount of his debt and interest; and it is stated in the record, that, upon that day, Trent executed a receipt, acknowledging the satisfaction of his judgment, and releasing his claim upon the land.

Trent files this bill, alleging that he was induced to agree to this arrangement through fear of personal danger from Phillips, and insists that he ought to be released from it altogether, or, if not, that he is entitled to a vendor's lien for the amount due him.

Phillips answers, and admits that Trent is entitled to

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this lien upon the land for the amount of the note; that such was the understanding and agreement. Kyle answers, and asserts that Trent has no lien, but must look alone to Phillips for his debt; and that the lien for purchase money was reserved alone to himself; to enforce which, it seems, another bill, filed by Kyle, is now pending. They neither of them admit the duress charged.

The Chancellor refused relief to the complainant upon the ground of duress, but gave a decree against Phillips for the amount of the note due complainant; and held, upon the proof, that the title bond should be so reformed as to include complainant's debt as a lien upon the land, this stipulation having been, in the opinion of the Chancellor, omitted by mistake of the draftsman; and decreed that this sum due the complainant, and the amount due Kyle, should be paid pro rata out of the proceeds of the sale, which seems to have been made in another case. From this decree, both the complainants and Robert Kyle appealed.

We are of opinion that the Chancellor was correct in refusing relief to the complainant, upon the ground that the contract was entered into under duress. The testimony upon this subject is principally in regard to the violent character of Phillips during the war, and although it may be probable that this fact had some influence upon the complainant's mind, yet the proof is too general to found a decree upon, as it does not appear that Phillips ever attempted to gain any undue advantage over the complainant, in regard to this transaction. But we hold that the complainant is entitled to a vendor's lien upon this land, for the amount due him,

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upon the facts that appear in this record. It will be observed, that, at the time of the execution of the title bond, by which the land was sold to Phillips, the time for redemption had already expired, and Trent, if he had chosen to insist upon his legal right, could have taken the Sheriff's deed, and been the absolute owner of the land, for it does not appear that he had made any previous agreement extending the right of redemption, so that Kyle's rights existed only by the concession of Trent. It is argued that Kyle redeemed the land from Trent with Phillip's note, and then sold to Phillips, and that the result is, Trent gave up all his legal advantage, with no security but the note of Phillips. Such we think, is not the legal effect of the transaction. Although the bond was executed by Kyle, it was, in substance, a sale of the land by Trent and Kyle both, and that each was entitled to receive from Phillips his share of the purchase money; Trent his debt and interest, and Kyle the balance; and each would be entitled to the lien retained for this purchase money, in the order in which the law would fix their rights, unless the same is clearly changed by the contract; and this, we think, appears from the title bond, without its being reformed. The bond recites that Kyle had sold the land to Phillips for \$5,500, payable as follows: \$630.90 in hand, the assumption of a debt to Wm. D. Trent, *now bid* upon the land, of \$869.10, to be paid 25th December, 1863; and the further sum of \$2,000 due the 25th December, 1863, \$1,000 due 25th December, 1864, and \$1,000 due the 25th December, 1865; and after describing this land, the bond concludes: "Now,

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if I shall make the said John W. Phillips a good and lawful title in fee simple, with general warrantee to the foregoing described land, on the receipt of the last payment, then this obligation to be void," &c.

Interpreted in the light of the surrounding circumstances, and the situation of the parties, we understand this bond to include, by its terms, the payment of the debt to complainants, as a condition precedent to the making of the title, and that the legal title was retained to secure this debt with the others. The debt is described as part of the purchase money, and the bond expressly says that the title is to be made upon the receipt of the last payment, and, by necessary inference, the previous payments were intended to be also executed. Trent's failure to sign the bond with Kyle cannot have the effect to defeat him of any right which the law gives him. Had Kyle paid Trent his debt, and Trent chosen to receive the same in satisfaction thereof, and in redemption of the land, then the result contended for by Kyle would follow, although Trent might have received the same in the note of a third party. But Kyle did not transfer Phillips' note to Trent in redemption of the land, as the argument erroneously assumes. Kyle held no such note. The note was executed directly from Phillips to Trent, and the consideration of the note was Trent's interest in the land.

The execution of the receipt by Trent, under the circumstances, only had the effect to give his assent to the transaction. If it were necessary to do so, we should be strongly inclined to hold that there is sufficient evidence in the record to reform the bond, so as to reach

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the same result. L. M. Jarvis proves that Kyle and Phillips came to him, in the absence of Trent, to have the papers drawn, and stated to him the arrangement that had been made, which was, among other things, that Trent was to take Phillips' note, but the same was to be secured upon the land; that he intended to so draw the bond, and thought he had done so. And if we were of the opinion that this was not the legal effect of the bond, we would be strongly inclined to hold the omission the mere mistake of the draftsman, and reform it accordingly; but, in the view we have taken, this is unnecessary.

The question remains, is Trent's debt to have priority over the debts of Kyle out of the sale of the land, or are they to be paid *pro rata*? As has been seen, we regard Trent and Kyle as joint vendors of the land, and in such a case the purchase money contracted should be paid to them, according to their legal right, as if the owner of a life estate, and the remainder man join in the sale of land for a given sum, but do not specify the share of purchase money due to each; the law fixes their relative shares, giving to the former the proportionate value of life estate, with the balance to the remainder man; or, where two mortgages join in a sale of the mortgaged premises, contracting for a given sum of purchase money, but not specifying how the same should be applied, the law would provide that the mortgagee whose debt was first secured should be first paid, unless this was clearly waived.

In this cause Trent's rights were clearly fixed, his debt securely fastened upon the land. Kyle's right, at

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most, could only be to have the surplus after paying Trent's debt. This was then the attitude when they join in the sale. This attitude of the parties could of course be reversed and this priority of Trent's waived by express agreement, but we are of opinion that no such agreement appears in this case; and in the absence of such agreement we hold that the purchase money is secured according to the legal rights of the parties as they existed at the date of the sale, and the complainants' debt is entitled to priority, and the decree will be accordingly. The costs of this court will be paid by Robert Kyle, and the costs of the court below will be paid out of the sale of lands, except the costs of complainant's own witnesses; and this will be paid by the complainants, except the costs of the witness, L. M. Jarvis, as we are of opinion that the testimony of the other witnesses was unnecessary and improperly taken.

JOSEPH MATHEWS v. SOLOMON MATHEWS.

1. AWARD. *Against two, on submission by one.* An award is not, by the fact that it is made against two, one of whom is not a party, void as to the other who has properly submitted to the arbitration.
2. SAME. *Set aside for fraud, etc.* An award obtained by inducing the adverse party, a brother, to yield a portion of his claim, under a threat to prosecute the father of both "for perjury," on a charge for which there was no foundation, will be set aside in a court of equity.

FROM GREENE.

In the Chancery Court at Greeneville, SETH J. W. LUCKY, Ch., presiding.

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NELSON, J., having been of counsel, did not sit in this case. His brief for complainant was presented by R. M. BARTON, who also appeared for complainant.

R. McFARLAND, for defendant.

JAS. T. SHIELDS, S. J., delivered the opinion of the Court.

The complainant and the defendant are brothers, and the sons of William Mathews, now deceased.

It appears that the father was the owner of a tract of land, and that by a parol contract, he agreed to convey it to defendant; that afterwards he changed his mind, and actually conveyed it to complainant. Thereupon, the defendant filed a bill in the Chancery Court at Greeneville, against both the complainant and his father, the said William, the object of which was to have the said conveyance set aside, and a specific execution of the parol contract which had been previously made; or, if this could not be done, to establish an account against the said William, and to have a decree for the sale of a sufficient quantity of said land to satisfy the same. The bill was answered by the defendants, with some particularity as to the matters of the account between the parties, which need not be here stated.

Pending this suit, Joseph and William agreed to submit the matters really litigated to arbitration; but their father did not join in the agreement. This agreement was written, and after citing the pendency of the suit, states that the said Joseph and William agree "to draw

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said suit out of court," and to have the matters in dispute arbitrated; that Solomon "shall lay before the arbitrators an account of all the charges that he has against William Mathews;" and that Joseph should "exhibit an account against Solomon for everything that the said William Mathews has charged against the said Solomon." The agreement further provides for the selection of arbitrators, and binds the parties to submit to their award.

In pursuance of this agreement, an award was made in favor of Solomon, that Joseph and William Mathews pay to him the sum of four hundred and nine dollars—two hundred in six months, with interest from the date of the award, and the remainder in twelve months, with interest, and that the costs be equally divided between the three.

The submission did not provide that the award should be made the judgment of the Court; but, on the contrary, provided that the bill should be dismissed, which seems to have been done before the award was made.

Upon the award, two suits were instituted before a Justice of the Peace—one upon each amount awarded, as it became due. In both cases, Solomon Mathews obtained judgment, from which appeals were prayed and granted, to the Circuit Court, where the same are now pending.

This bill was filed for the purpose of having the said award declared void and set aside, and the two suits pending on the same perpetually enjoined.

The bill charges that said award was procured by gross fraud and imposition, on the part of said Solomon

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Mathews; that the complainant made out and presented his father's account substantially as it had been stated in the answer to the bill, inclusive of a certain wagon, particularly mentioned and charged in the answer; that after several witnesses had been examined, the arbitrators adjourned until the next day; that on the morning of the second day, and before the arbitrators resumed the consideration of the matters submitted to them, the said Solomon took the complainant aside, and said that he was surprised at the charge of the wagon in the account; that the said William had sworn to both the answer and the account; that in the answer he had claimed compensation for only the *use* of the wagon, and in the account he had charged for the wagon itself; "that the old man had perjured himself" in swearing to the correctness of the one or the other, and that he would prosecute the "old man" for perjury, unless the charge for the wagon, and also a charge for labor done by "the old man," and mentioned in the same answer, were both stricken from the account.

The bill further charges that there was no substantial difference between the said answer and account, but this did not occur to him at the time; and that being greatly alarmed by this unnatural and unfeeling threat by his brother to prosecute their father, who was far advanced in life and in feeble health, and to save him from the vexation and annoyance of such a charge, he agreed to, and did, strike out said two items, but for which no award would have been made in favor of the said Solomon. For this reason, and because the complainant was not indebted to the said Solomon, so that

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the said submission was, as to complainant, without consideration; and because the said William, not having signed the agreement of submission, was not a party thereto, so that the arbitrators exceeded their authority in making a joint award against the said William and complainant, it is insisted that the award is null and void.

The bill does not excuse the defendant from answering on oath, and the answer in response substantially denies the allegations of the bill as to the circumstances under which the said two items were stricken from the account.

Upon a review of all the facts and circumstances which surrounded the parties at the time of the submission, and of the questions involved in the pending litigation, we think the complainant in the present suit had an interest in the matters submitted sufficient to support his agreement to abide by and perform the award of the arbitrators.

And we are further of the opinion, that the fact that the award is in part against the father of Joseph and Solomon Mathews, who was not a party to the submission, does not render it void as to Joseph. The arbitrators did not transcend their authority in this particular; but an award may be good in part and bad in part. It is void only *pro tanto* if that which is void affects not the merits of the submission. Such, we think, is the case now before us. If there were nothing more in the way, we should hold the award binding as to the complainant. *McBride v. Hagan*, 1 Wend., 326;

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Clement v. Durgin, 1 Greenl., 300; 6 Greenl., 247; 13 Johns, 264; 2 Cow., 638; Cald. on Arbitration, 276.

But we think the proof fully sustains the allegations of the bill, as to the suppression of the two items in the account, on the trial before the arbitrator, and this after giving to the answer the force and effect it is entitled to as evidence. It is very clearly made out that the complainant struck out these two items because of the threats made by the defendant to prosecute the father for the crime of perjury. There was no foundation in fact for the charge of perjury. The father in his answer had stated that Solomon was liable to account to him for the use of the wagon; or, if he retained it and some other property mentioned, for the value of the whole; and the wagon not being returned when the account was made out, the value of it was entered as one of the items. The father was an old man, nearly ninety years of age, and the complainant; in part in consequence of apprehension of real danger, (not understanding the matter,) and in part to save his aged father from the terrible annoyance, in his old age, of a prosecution for felony, and this at the instance of his own child; yielded the two items, and withdrew them from the consideration of the arbitrators.

The jurisdiction of a court of equity in matters of awards, and to interfere within certain bounds and set them aside, in cases of fraud, mistake, accident, or the corrupt and oppressive conduct of parties or arbitrators, is well established. Cald. on Arb., 275, *et seq*; 2 Sto. Eq., 1451. And we are of the opinion that the exercise

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of that jurisdiction is highly proper in the case now before us.

No question can be made as to the effect of the judgment before the Magistrate, they having both been vacated by the appeals to the Circuit Court. Certainly, where evidence is suppressed and an award obtained by such means as were resorted to in the present case, looking to the peculiar relations of the parties; to the fact that the threat was made against a father in extreme old age, and made by his own son, and without grounds, and brought to bear upon the mind of another son, then acting for and representing the father, no court could hesitate to set aside the award as having been obtained by the fraudulent, corrupt and oppressive conduct of one of the parties.

This was the view of the case taken by the Chancellor. We think it was correct, and affirm the decree.

PLEASANT OWENS v. CLINTON MYNATT and DAVID OWENS.

1. **DURESS.** *Father and Son.* A note executed by a father as surety and a son as principal, under the influence of threats that the son would be taken off, and, as the parties reasonably apprehended, killed, is void as to both, for duress.

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2. SAME. *Principal and Surety.* A note void for duress as to the principal is void as to the surety.

FROM KNOX.

Appeal from the Chancery Court at Knoxville. The transcript does not show what Chancellor rendered the decree.

J. R. COCKE, for complainant.

M. L. HALL, for defendants.

TURNER, J., delivered the opinion of the Court.

The decree of the Chancellor is erroneous. The complainant filed his bill in the Chancery Court at Knoxville, seeking to enjoin the collection of a note for two hundred dollars, executed by complainant and defendant, David Owens, in May, 1865, and further seeking to have said note declared void and delivered up to be cancelled, alleging duress of both makers at the time of the execution of the note.

The facts are, that in May, 1865, and on the night of the day on which David Owens reached the house of complainant, his father, on his return from the Confederate army, defendant, H. L. C. Mynatt, (called Clinton,) in company with two of his brothers, at a late hour, went to the house of complainant, and inquired for David Owens, who was in bed up stairs; or, as some of the witnesses expressed it, in the loft. They entered the house with pistols in their hands. Complain-

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ant was also in bed. One of the party went into his room; the other two went up stairs. David Owens, finding out they were there, and coming up with arms in their hands, called to them to lay down their arms and he would meet them friendly. They told him they would not lay down their arms. They went up to his room with pistols; told him to get up or they would make him; that they had a settlement to make with him; that he had taken two of Clinton's horses, and they wanted pay for them, and if he didn't pay for them they would take him off. He told them he had not taken the horses, and knew nothing about them. They continued then to threaten until he agreed to give his note. The complainant, to prevent their carrying his son off and killing him, as he reasonably feared they would, became security on the note to Clinton. The Mynatts were at the house of complainant, aggravating their outrage, for several hours. David left the next morning, and has not returned.

The Chancellor held this conduct to be no duress of the father, and intensified the error of this holding, by further declaring, the duress of the son was no defense for the father as security upon the note of the same. If this were so, the payee could sue and recover from the security; then the security might take his judgment against the principal, and thus duress, however terrible, would be in the end avoided as a defense.

The proof shows the Mynatts to live in sight of complainant's house. Complainant and his son were actually imprisoned, and secured in that imprisonment by arms, exhibited by those men whose conduct at the time

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is most ruffian-like, and for a purpose unlawful, if not felonious.

There is evinced in the record a vileness of principle, not only sufficient to put in fear the persons against whom it is immediately aimed, but of which the community in which it exists may entertain well-founded apprehensions. This conclusion is made manifestly correct by the fact that defendant, Mynatt, not only fails to prove, or even propose to prove, that David Owens or any one else took his horses, but strangely enough, fails to prove that he ever lost a horse at all.

Reverse the decree, let the note be delivered up, and the injunction made perpetual.

WM. K. McLIN and WM. B. ROBINSON v. A. J. MARSHALL.

DURESS. *Jurisdiction of Law and Equity concurrent.* The remedies for duress are concurrent in Law and Equity ; and whichever first takes jurisdiction, obtains exclusive cognizance of the case.

Cases cited: *Lindsay v. James*, 3 Cold., 477 ; *Taylor v. Carlyle*, 20 How., 583 ; *Broyles v. Arnold*, MSS., Knoxv., 1870 ; *Porter v. Jones*, 6 Cold., 313.

FROM GREENE.

Appeal from the Chancery Court, at Greeneville, before J. P. SWANN, Ch.

H. H. INGERSOLL, for complainant, cited 1 Sto. Eq.

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Jur., 239; 5 Hay., 75, 78; 7 Yer., 67, 73; Cooke, 266; 2 Hum., 545, 546; Meigs, 155, 157, and n.; *Id.*, 590; 4 Sneed, 238; 3 Hum., 623; 2 Head, 617.

R. M. BARTON, for defendant.

DEADERICK, J., having been of counsel, did not sit. MCFARLAND, Sp. J., sitting in his stead, delivered the opinion of the Court.

This bill charges that the defendant brought suit against the complainants before a Justice of the Peace of Greene County, and obtained judgment; and from this judgment they appealed to the Circuit Court of the county, where the cause is pending. That the suit was brought upon a note executed to the defendant by the complainants, for \$150. That the execution of the note was procured by the defendant causing and procuring a State's warrant to be issued against the complainant, McLin, upon a false and unjust charge of robbery, alleged to have been committed during the war, by taking a horse from the defendant's wife; and to avoid this arrest, the note was executed under actual duress. To this bill there was a demurrer, upon the ground, among others, that the complainants' defenses to the action at law were clear and unembarrassed, and that no reason is given for transferring the investigation of the cause to a Court of Chancery.

The demurrer was overruled, the bill answered and proof taken, upon which there was a final decree in favor of the complainants, enjoining perpetually, the action at law; from which the defendant has appealed.

The defenses to the note set forth in the bill are not

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purely of an equitable nature. That the note was executed under duress was a defense that might well and properly have been made at law; and it does not appear from any thing stated in the bill that this defense at law was in any manner embarrassed. That a note sued upon was executed under duress was a good defense at common law. 1 Chit. Pl., 477, 484. Relief may also be granted against contracts thus obtained in equity. 1 Story Eq. Jur., § 239. And we hold that in a case of concurrent jurisdiction that if the court of law first obtain jurisdiction of the cause, the parties must be allowed to proceed to final judgment in that forum, unless the bill presents a case in which the remedy at law is embarrassed or inadequate, or in which the relief afforded in equity is more complete and efficacious. Such, we understand to be the principle established in the case of *Lindsey v. James et als*, 3 Cold., 477; *Taylor v. Carlyle*, 20 Howard, 583; *Broyles v. Arnold*, decided at the present term, and many other authorities that might be cited. It would seem that a different doctrine was applied in the case of *Porter v. Jones*, 6 Cold., 313. However, his Honor, Judge Andrews, in delivering the opinion of the Court, fully admits the doctrine here stated; and in that case sustained the jurisdiction of the Chancery Court alone upon the ground that the court of law was unable to render complete justice between the parties, and that the relief in equity was more efficacious.

We are unable to see from any thing in this bill alleged that the complainant's defense at law was in any manner embarrassed. Upon proving the allegations of duress as a defense to the suit in the Circuit Court, he would be entitled to a verdict and judgment in his favor,

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and this judgment, unappealed from, would be a conclusive and final adjudication of the defendant's right to recover upon the note in controversy, and we are unable to see that this judgment would not be complete justice to the parties, or that a court of equity could give any more complete and efficacious relief than this. True a court of equity could order the note to be delivered up and cancelled, and enjoin the defendant from using it again, but if this be a good ground for transferring the jurisdiction to a court of equity it would furnish authority for any defendant who may be sued at law upon a note or other evidence of debt, to file his bill in equity, to have the action at law perpetually enjoined, and the note cancelled upon the ground that he had paid it or was entitled to some other valid defense, and this, we think, would be in conflict with well-settled principles.

We are therefore constrained to reverse the decree, sustain the demurrer, and remit the complainants to their defenses at law. As the cause may be tried by a jury we intimate no opinion upon the merits.

REUBEN PARROTT v. LEDFORD PARROTT, *et al.*

1. FRAUD. *Evidence.* Fraud, always conceived in cunning and difficult of proof, is properly proved by circumstances.
2. CHANCERY JURISDICTION. *Rescission. Fraud.* In the cancellation, rescission or reformation of deeds and other instruments for fraud, acci-

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dent, &c., the jurisdiction of the Chancery Court is unembarrassed, and its remedies complete.

3. **SAME. Same. Case in judgment.** In a case where it appears that a father, growing helpless with old age, had deposited an absolute deed of his lands to his son, with a neighbor, upon the promise of his son to execute a bond for the support of the grantor and his wife for life, and upon the execution of said bond the deed to be delivered to grantee; and it appeared that after the lapse of several years, with no sufficient excuse, the bond had not been executed; and the son, combining with the depository of the deed, had caused the clandestine registration thereof, a court of equity will deduce a fraudulent purpose, and decree the cancellation of the deed.
4. **PARENT AND CHILD. Chancery Court.** There are certain principles pertaining to the relation of parent and child, that lie at the foundation of social order and domestic happiness, which a Court of Chancery will regard in adjusting a litigation between parent and child. Filial irreverence and ingratitude are reprobated in a court of equity.

FROM CLAIBORNE.

From the Chancery Court at Tazewell, S. J. W. LUCKY, Ch., presiding.

W. R. EVANS, for complainant.

J. T. SHIELDS, for respondent.

SNEED, J., delivered the opinion of the Court.

On the 15th of May, 1860, Reuben Parrott, executed a deed of gift of a tract of land in the county of Claiborne, to his two sons, Ledford and Latney Parrott. This deed was placed in the hands of Henry Beach, who wrote it for the parties. This bill was filed in Chancery at Tazewell, on the 4th of December, 1865, to have said conveyance set aside and annulled, and the alleged fraudulent registration thereof, declared void, and

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of no effect. To this bill, Ledford Parrott, Latney Parrott, and Henry Beach, are made parties defendant. The bill alleges, that the complainant is an old man, physically infirm, and ignorant of the forms and usages of business life. A copy of the deed is among the exhibits in the cause, and both the deed and the affidavit to the bill, are subscribed with the "mark" of the complainant.

It is charged that the complainant sent for his near neighbor, the defendant, Henry Beach, to write his will; that Beach having undertaken the task of writing the old man's will, and having already begun to write the same, advised the complainant that it would be better to convey the lands he intended to give the defendants, Ledford and Latney, by deed. To this the complainant assented, with the understanding, between him and his sons, that, in consideration of the deed, they were to execute and deliver to him a bond, to provide for him and their mother, a home, and an ample support during the remainder of their lives. That the parties agreed that the defendant, Beach, should retain the deed until the bond was executed; and the delivery of said deed to Beach, was as an escrow, without any intention of its surrender to defendants, Ledford and Latney, until they had complied with the conditions upon which it was executed. That, although the deed recites a pecuniary consideration, yet no money was paid, demanded, or contracted to be paid for the land, but that the sole consideration therefor, was the maintenance of the complainant and his wife, during their lives, by his said sons, to be secured by the execution of said bond. That

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the complainant expected the bond to be executed on the same day the deed was written, but it was postponed on account of the lateness of the hour at which the writing of the deed was finished. The complainant charges, that while the defendant, Latney, has, in all respects, demeaned himself toward him as a dutiful son, has relinquished to the complainant all interest he claimed under said deed, has contributed all he could toward the support and comfort of his parents, in their declining years; that the said Ledford has been undutiful and unkind; that though often called upon to execute said bond, he had persistently refused to do so; that he has contributed nothing toward the support of his parents from the time of the execution of said deed to the time of the filing of the bill; that the said Ledford and defendant, Beach, have combined together to defraud him of his land; that they had gone clandestinely to the Register's office, and caused said deed, after the probate thereof, to be registered, without consulting or advising him or the said Latney, thereof, but that the fact of such clandestine probate and registration had been purposely concealed from them; and that he had caused search to be made in the Register's office for the original deed, and it could not be found; that, as the said Ledford has continually neglected and refused to execute said bond, the complainant believing that he was no longer bound by said agreement, had demanded said instrument of the said Beach, who refused to surrender the same, stating that the deed was placed in his hands by all three of the parties, and he would only deliver it when he could find them all together; that, under said deed, defendant, Ledford, was claim-

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ing an undivided half of the land, and was endeavoring to sell the same.

There are other allegations in the bill, of the acts of said Beach and said Ledford, tending to show a combination between them to wrong the complainant; but the case made out in the bill is sufficiently indicated in the foregoing abstract of its charges. The bill prays for an injunction, forbidding the sale, renting or occupation by the said Beach and Ledford, of said land; that the deed be declared null and void, and the registration thereof of no effect; that the deed be delivered up to be canceled, and for general relief. The defendants are called upon to answer; but the oaths of defendants, Ledford and Beach, are expressly waived. The defendant, Latney, does not answer; but the cause proceeds against him under an order *pro confesso*. The defendants, Ledford Parrott and Henry Beach, file a joint answer, which is sworn to. They deny the fraudulent combination, or the intent of fraudulently combining to wrong the complainant or to deprive him of his land. They insist that the deed was absolute and unconditional; that the agreement to execute the bond was a collateral undertaking; that the deed was delivered to said Beach by his two co-defendants, Ledford and Latney, and not by the complainant. They admit the registration of said deed, and are silent as to the manner thereof; that when the will was in course of preparation, nothing was said as to the support and maintenance of the old people; but when the complainant changed his mind and determined to convey by deed, he at once demanded that the defendants, Ledford and

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Latney, should bind themselves to support and maintain their parents during the rest of their lives, and secure them a home on the land; that it was understood and agreed that the bond should be executed at some convenient time; but it is insisted that the deed had no dependence on the bond, but that the agreement as to the bond was independent of and collateral to the deed; that the latter was not deposited as an escrow, but delivered as an absolute deed, by the said complainant to the said Ledford and Latney, and by them to said Beach, to be retained by said Beach until demanded by them. The defendant, Ledford, denies his unwillingness to execute the bond. He avers that he was never called upon, directly, to so do, and asserts his willingness and readiness to do so now. He claims the land as his own, but denies that he ever attempted the sale thereof, to the injury of his father. He alleges that he offered to furnish his father with provisions; but he would not receive them. He disclaims all intention of wrong or fraud, either by himself or in combination with said defendant, Beach, and charges that his brother and co-defendant, Latney, has poisoned the mind of his father against him, that he may absorb his portion of the old man's estate.

The decree of the Chancellor was in favor of the complainant. He declared the instrument in question to have been deposited as an escrow; that the registration thereof was fraudulent, void, and of no effect; that the instrument was a nullity; and that the title of the complainant was unaffected by the proceeding. He decreed that the defendants deliver up the deed to be cancelled, and that defendants, Ledford and Beach, pay all the

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costs of the cause. From this decree, the said two defendants appealed.

We have given to the facts disclosed in this case the most careful consideration. We have endeavored to accord to the conduct of defendants, Beach and Ledford Parrott, the most charitable construction, and to reconcile it with that integrity of purpose which they claim for themselves in their answer. The result is, that, in every respect, our convictions coincide with those of the Chancellor. It is difficult to imagine a case where a fraudulent purpose, always conceived in cunning and difficult of proof, has been more successfully demonstrated by a well linked chain of circumstances, than in this case.

We are not fully advised of the complainant's mental condition at the time of the execution of the deed. The defendants sought to prove that he was of sound mind, but the evidence is evasive and unsatisfactory. One or two of the witnesses, when interrogated as to the state of complainant's mind at the time, answered that he was "as sound as common;" another, "cannot say that he was sane or insane." We are informed in the bill, that he is an old and infirm man; and we are left to infer from the proof, that the complainant, naturally credulous and confiding, was rendered none the less an easy victim of imposture by that imbecility of mind which keeps even pace with gathering years. The Court of Chancery, while it guards with jealousy the rights of all, recognizes decrepit old age, no less than helpless orphanage, as its peculiar ward. 1 Swan, 474; 5 Sneed, 282; 1 Story Eq. Jur., 237.

But the case is rested, in the bill, not upon any

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ground of mental imbecility on the part of the complainant, but upon the allegation of a fraudulent combination between the two respondents, to cheat and defraud complainant out of the land in question, and a failure of consideration; and upon these grounds alone, assumed in the decree to be proven, does the Chancellor rest his decision of the case. To relieve against the effects of deliberate fraud, is among the inherent powers of the Court of Chancery; and, it may be said, that no phase of its jurisdiction is exercised with more alacrity.

In the cancellation, rescission or reformation of deeds, or other instruments, for fraud, accident, mistake, or other valid cause, its jurisdiction, founded upon the administration of what is called a "protective or preventive justice," is unembarrassed, and its remedies complete.

Was the deed handed by the parties to Henry Beach, on the 15th of May, 1860, intended as an absolute deed, to be delivered when called for, to the grantees, or was it deposited with him as an escrow to be delivered as a deed only on the performance of certain conditions? An escrow is concisely defined as a conditional delivery of a deed to a stranger, and not to the grantee himself, until certain conditions shall be performed, and then it is to be delivered to the grantee. Until the condition be performed and the deed delivered over, the estate does not pass, but remains in the grantor. 2 Johns. R., 248.

The first question by which we are confronted in this case, is, why it is that for five years or more from the date of the execution of the deed to the time of the filing of the bill, this instrument should have remained

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in the custody of the defendant, Henry Beach? He says in his answer, that it was delivered to him by the grantees, to be preserved for them, and that it was done when it was executed, and in the presence of the grantor. The complainant says that he delivered it to Beach as an escrow, a special deposit, only to be good in passing the estate therein described, upon the performance of a condition of the most vital importance to the grantor. If it was intended as an absolute deed, to take effect at once, why charge Henry Beach with the custody of it at all? Why not deliver it at once to the grantees themselves? This question, when considered in connection with other facts of this case, is decisive of the rights of the parties. We have the proof here very clearly made, that, in spite of the positive denials of the answer, the condition of this deed was, the execution of a bond by the grantees, to maintain and support their parents during the remainder of their lives. We have it shown, beyond all doubt, that the complainant was about to have his will written; that anxious to make an equitable division of his estate among the natural objects of his affection and his bounty, he had sent for his near neighbor, the defendant, Henry Beach, to write his will; that after he had progressed in said writing nearly to a conclusion, the old man suddenly changed his mind, *he* says, at the suggestion of Henry Beach; but the defendant, Beach, in his answer, is silent as to this charge, which becomes a serious one, in connection with other facts in this cause. We have it shown that defendant, Ledford, for five years, neglected and refused to execute the promised bond. We have it, that, for a

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part of that time, Ledford and Beach were controlling and enjoying the rents and profits of a part of the land. We have it, that Beach refused to surrender the deed, although offered indemnity by the complainant, and that he and Ledford, without consulting or advising complainant, or the said Ledford's co-grantee, Latney Parrott, had gone secretly to the town of Tazewell, and caused the probate and registration of this deed, about the 7th of September, 1865, which, when the complainant ascertained, as he did by accident, through one of his neighbors, he at once took steps for the filing of this bill. We have it, that, through this period of time, when the complainant was exerting himself to secure the bond or the deed, that the defendant, Ledford, admits a sale of the land to his co-defendant, Beach, and that Beach proposes a trade with Bowman, if the latter will give him an advance of fifty dollars upon the one thousand he had agreed to give Ledford.

The remark of Beach to the witness, Bowman, is not very clearly defined, but taken in connection with Ledford's admission of a sale, and the price, it can mean nothing else than a proposition to take fifty dollars for his bargain. We have it shown, in spite of the denial in the answer and the statements of one or more witnesses, who have evidently forgotten the details of the transaction, that the defendant, Beach, in some unguarded moment, admitted to one of the Bowman's that he *keld the deed for the complainant and his two sons*, and he also said that he knew how the deed *could* be taken out of his possession, but he would not tell it. In connection with Beach's subsequent purchase of Ledford's

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undivided interest, under the deed, as tenant in common with Latney Parrott, it is a significant fact, that, as charged in the bill, the complainant had caused a line of partition to be designated in the will to allot to each of his sons the share intended for him, and that such was the understanding of his intention by all the parties, and the will was prepared accordingly; and that, in the preparation of the deed his wish in this respect was disregarded; and he was induced to believe by said Beach that the deed was best as it was, granting the estate to his sons as tenants in common, without reference to the said line, and "that the boys could divide according to said line." In this the complainant's wishes were defeated and disregarded; and he charges that Ledford had always repudiated said division line, and refused to conform to it. The unfinished will is transcribed into the record and its identity proven. The complainant charges that the proposition to give the land by deed instead of by will came from the defendant, Henry Beach, while he was writing the will; and it is a strange and suspicious feature of the transaction, that said proposition should have been made at the very instant the complainant made known to Beach what part of the land he intended to devise to the defendant, Ledford. The will, after designating the line of partition, proceeds with these words: "Whereby I will and bequeath to my son, Ledford Parrott, all of the before named tract of land lying on the west side of the above named line," and here it abruptly terminates; and, at this instant, the defendant, Beach, the draftsman of the will and the deed alike, suddenly proposes to change the

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mode of disposition from a will to a deed. The complainant assented, with the understanding that the line indicated in the will should be carried into the deed. The deed is then written, disregarding the line of division, and conveying the land to the two sons as tenants in common, in undivided moieties. The complainant charges that, although he insisted upon the observance of the line, yet his wishes were disregarded, and he was induced to sign the deed as it was, the defendant, Beach, assuring him that it was best as it was, and that "the boys could divide according to the line." The answer makes no response to this allegation of the bill. The defendant, Beach, becomes one of the witnesses to the deed; and the sequel, his conduct in regard to the custody of the deed, his secret probate and registration thereof, and his subsequent negotiation for the purchase of Ledford's interest in the land, explains his conduct and betrays his design from the beginning.

But, if any clearer demonstration of the character of these transactions be necessary, it may be found in the utter silence of the answer as to some of the more serious charges of a fraudulent complicity, as alleged in the bill; in the fact of the close alliance of the defendants, Beach and Ledford, in regard to the matter from the beginning to the end; in the fact that they secretly caused the registration of the deed; in the fact that when the deed was demanded of Beach, his co-defendant, Ledford, forbade its surrender, and he obeyed him; in their negotiations for the sale and purchase of Ledford's interest in the land; and in the fact that their solemn asseverations in the answer, that the deed was

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delivered by the complainant as an absolute deed, and not as an escrow, are positively disproved by Beach's own admissions that it was delivered to him by all three of the parties, to be held for all alike.

We have in this case, an exhibition of filial irreverence and ingratitude, which could scarcely hope to escape the severe reprobation of a Court of Chancery. There are certain principles pertaining to the relation of parent and child, that lie at the foundation of social order and domestic happiness, which a court of equity can not disregard in adjusting a litigation between them. "The duties of children to their parents," says Sir William Blackstone, "arise from a principle of natural justice and retribution; for to those who gave us existence we naturally owe subjection and obedience during our minority, and honor and reverence ever after. They who protected the weakness of our infancy are entitled to our protection in the infirmity of their age; they who, by sustenance and education, have enabled their offspring to prosper, ought, in return, to be supported by that offspring, in case they need assistance. And upon this principle proceed all the duties of children to their parents, which are enjoined by positive laws." 1 Black. Com., 374.

The decree of the Chancellor in this case, might very well have reposed upon the badges of fraud and the reprehensible conduct of the defendants, already indicated in this opinion. But another remains to be disclosed.

It is proven that the defendant, Ledford Parrott, actually caused the arrest of his father and mother, and

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his sister and his brother, upon a State's warrant, for an assault, and also upon a peace warrant; and that he stated to a neighbor that he would not appear against them in the State prosecution, if the old man would dismiss this bill. This unnatural and extraordinary conduct is not explained in the testimony, nor is a question asked concerning it upon cross-examination of the witness. We forbear to criticise as it seems to deserve. We are left to infer, in the absence of all explanation upon the subject, and in view of the previous conduct of the defendant, that this criminal proceeding was as frivolous as it was unnatural, and that it was instituted by him to subserve a special purpose, in regard to this litigation.

We find no error in the action of the Chancellor, and affirm his decree.

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1. GUARDIAN. *Note made by.* A statement in a bill, that the complainant, as guardian of J. C., executed a note, shows an individual liability on the part of the complainant.
2. PRESUMPTION. *Payment.* Presumption of payment is a disputable presumption.
3. CHANCERY PLEADING. *Bill construed.* A bill filed by the guardian to enjoin a suit at law on a note, insisting that it was executed by him as guardian, so his ward was liable upon it, and that from lapse of time, the presumption had arisen, that he, the ward, had paid it, negatives a payment either by the complainant or by the ward, the complainant having bound himself to pay it, but not alleging that he had done it, and the ward being under no obligation to pay it.

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3. **SAME.** *Limitation. Suspension of.* It seems that time, during which the statute of limitation is suspended, is not to be computed in raising a presumption of payment from lapse of time.
5. **LIMITATION.** *Must be pleaded.* On a bill filed to set up a presumption of payment, the party can not avail himself of the statute of six years, unless he specially rely on it in his bill, or plead it in some form.
6. **SETTLEMENT.** *Presumed to include all dealings.* A guardian, stating that he had executed a note as guardian, and had afterward settled with the County Court, it will be presumed, in the absence of proof, that he was allowed for the note on his settlement.

FROM WASHINGTON.

From the Chancery Court, at Jonesboro. The case was tried before TEMPLE, Ch., at May Term, 1868.

DEADERICK, J., having been of counsel, did not sit in this cause. His brief was filed for complainant, R. Love, a defendant, surety of complainant.

R. MCFARLAND, for defendant, Wolfe.

NELSON, J., delivered the opinion of the Court.

The transcript of record in this case, does not show when the bill was filed. The *fiat* for an injunction, seems to bear the date, 20th July, 1866. The prosecution and injunction bond seem to bear date, 27th January, 1866, and the injunction appears to have issued on the same day, and to have been made known to two of the defendants, on the first of February, 1866, and to the other on the 26th of the same month. It may therefore, be inferred that there is a clerical error in the Judge's *fiat*, and that the bill was filed on or about the 27th January, 1866. Complainant charges, that on or

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about the 25th November, 1847, he, as guardian of Jas. T. Carter, together with Robert Love, as his security, executed a note to Joseph Wolfe; that the said James T. Carter obtained his majority in the latter part of the year 1850, about which time, complainant made a settlement as guardian, with "the court," and delivered to said Carter, the custody of his entire property; that from that period until said Carter's death, in July, 1859, the said Wolfe lived within a few miles of him, and could, at any time, have collected his debt, as the said James T. Carter had ample means out of which the debt could have been made; that after his death, his administrators filed a bill, alleging the insolvency of his estate, and enjoining the creditors; that complainant was in no way responsible for the debt, except as guardian, and that in violation of the injunction, the said Wolfe had brought suit upon the note, on the 20th January, 1866, against Robert Love, the security, before a Justice.

Among other things, the prayer of the bill was, that Wolfe, Love, and the Sheriff in whose hands the note had been placed for collection, should be made defendants, and that Wolfe and the Sheriff should be enjoined from prosecuting the suit and collecting the debt; and that on final hearing, the said Wolfe should be required to look to the estate of James T. Carter, and be perpetually enjoined from collecting the same out of complainant, or Love, his surety.

In the bill, as well as in the answer of Love, it is strenuously insisted that the debt was, in reality, the debt of James T. Carter; that it could have been collected from him by due diligence, and that the presump-

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tion of payment arose from the lapse of more than sixteen years after the maturity of the note, and before the commencement of the suit against Love.

Wolfe, in his answer, states, that the note was executed by D. W. Carter, as guardian of James T. Carter, and due on the 22nd of November, 1847, for \$150, of which amount the sum of \$50 is credited, 25th of November, 1847; and that on the 3rd of February, 1866, he recovered judgment before the Justice against Robert Love, the security, for \$209.30 and costs. He denies that the note was ever paid, and says that on the 27th of July, 1860, "it was taken out of his hands by the Sheriff, and filed in the Chancery Court at Elizabethton," in the suit brought by James T. Carter's administrator, for the purpose of having the estate administered as an insolvent estate, and that the note remained there until the January Term, 1866, when respondent, by leave of the Court, withdrew the note, and brought his suit in Washington county, against Love, his co-defendant. Wolfe states that he had no knowledge of complainant's settlement as guardian; that he frequently applied to James T. Carter, in his lifetime, and to his administrator, after his death, for payment, but was unable to obtain it, and that he is not, and never has been, a very close collector.

No copy of the note, or of the proceedings before the Justice, is contained in the record. The case was set for hearing on bill and answers, without other evidence than certain admissions made by the parties upon the hearing; and the Chancellor, at the May Term, 1868, pronounced

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a decree in favor of complainant, from which Wolf prosecutes this appeal.

It was admitted, on the hearing, that Wolf was enjoined in the suit at Elizabethton, and filed and withdrew the note, as stated in his answer; and he, on his part, admitted that the debt in controversy could have been collected out of James T. Carter, at any time after he obtained his majority, in 1850, and before his death, in July, 1859.

The Chancellor adjudged, in his decree, that the presumption of payment arises, in this cause, in favor of complainant, and Love, his surety, and perpetually enjoined the collection of the note from them; but directed that the note might be filed against the estate of James T. Carter, deceased.

Upon several grounds, we hold that the Chancellor's decree is erroneous.

1. From complainant's own showing, it is manifest that the debt was his own, and not the debt of his ward. The ward was a minor, and incapable, in law, of executing a valid note. It was signed by the guardian, and not by the ward. The addition of the word "guardian," or the words "guardian of James T. Carter," to complainant's signature, did not, as the law stood at the date of the contract, change its nature. Such words were merely descriptive of his person. In *Erwin & Bass, v. Carroll*, 1 Yer., 145, it was held that a bill, single, signed thus: "J. P., administrator of J. P., deceased," was the personal debt of the administrator, and that his sureties, as such, were not bound for it to the

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distributees. In 1 Pars. on Notes and Bills, 89, 90, it is stated, that if a guardian signs a note, affixing his office to his name, as "A. B., guardian," he is nevertheless held personally, because he cannot bind, by such an instrument, the person or property of his ward; and it is still the promise of the signer. "Undoubtedly, he may secure himself from personal liability by saying that he promises to pay out of his ward's estate, and that only, if that be sufficient," but it is not insisted that any such stipulation was in this case, contained in the note.

2. It is alleged in the bill, that complainant made a settlement, as guardian, with the Court, and it is to be presumed, if the debt to Wolfe was lawfully contracted on account of his ward, that he was allowed, or might have been allowed, a sufficient amount in that settlement, to satisfy the liability. The bill contains no averment to the contrary.

3. Neither the bill of complainant, nor the answer of Robert Love, contains any averment that the note was, in fact, paid by them, or either of them, or by James T. Carter. It is alleged in the bill, that Wolf, the holder of the note, could, at any time, have collected the debt from said Carter, "previous to his death, if, in fact, he did not do so;" and that he has lost his remedy against complainant, "if, in fact, the note was not paid by James T. Carter in his life-time;" and it is erroneously contended, in Love's answer, that the law presumes the debt was due from said Carter, and that "the contract between said Wolf and respondent was, that respondent would be security for said sum, only during the guardianship of the said D. W. Carter." The

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entire defense rests upon the unauthorized assumption, that James T. Carter was primarily liable for the debt; that he was able to pay it, and that, in consequence of this ability and the lapse of time, the presumption of payment arises.

4. Before the distinction between sealed and unsealed instruments was abolished by section 1804 of the Code, it was uniformly held in this State, that the word "note" signified an unsealed instrument. The word "bond" meant an instrument under seal; and it was repeatedly held that, in absence of the payment of interest, or any proof of demand or acknowledgement, a bond would be presumed, after the lapse of sixteen years, and under special circumstances in a shorter time, to have been paid. See *Blackburn v. Squibb*, Peck, 60; *Atkinson v. Dance*, 9 Yerg., 424; *Anderson v. Settle*, 5 Sneed, 203; *Thompson v. Thompson*, 2 Head, 407; *Husky v. Maples*, 2 Cold., 27; *McDaniel v. Goodall*, *Ib.*, 395. In most of these cases, as well as in *Greenl. Ev.*, § 39, it was either distinctly held or intimated, that the presumption is not absolute, so as to form a complete bar to the action, but may be "repelled by any evidence of the situation of the parties, or other circumstance, tending to satisfy the jury that the debt is still due." See, also, 4 Petersdorff's Common Law, 642, 643, m.

In all the pleadings in this case, the instrument sued upon is styled a note; and it is not stated whether it was a sealed or unsealed instrument. The legal presumption is, that it was an unsealed instrument; and the presumption of payment, arising from the lapse of time, and relating to sealed instruments, is not, perhaps,

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technically applicable. If it were, we would feel strongly inclined to hold that the special circumstances of this case repel the presumption, as the complainant and Love, his surety, expressly admit the execution of the note, and do not insist that it was paid by either, but rest their objection to a recovery upon the fact that James T. Carter, who was able to pay the note, but was not legally liable, should be presumed, from the lapse of time, to have discharged a debt which he was not bound to pay. It may be observed, further, that the full period of sixteen years did not elapse before the commencement of the late civil war, and that perhaps the time excluded from computation by the amended Constitution, as to the statute of limitations, should, by analogy, be excluded, in ascertaining the presumption of payment.

5. It does not appear that the statute of limitation of six years was pleaded or relied upon by Love, the security in the suit at law, upon the note before the Justice, and we hold that, in order to be available, it should have been formally pleaded or relied upon in this Court. In *Maury v. Lewis*, it was said that the answer does not rely upon the statute of limitations, and, therefore, the defendant can not now insist upon it. 10 Yer., 118. See, also, Story's Eq. Pl., § 751; Mitf. Pl., 273 m.; *Allen v. Word*, 6 Hum., 284; *Graham v. Nelson*, 5 Hum., 605. The liability for the debt is virtually admitted by complainant and his security, Love, if the presumption of payment by James P. Carter did not attach. Nothing is said in the bill in regard to the statute of limitations, except that in the prayer it is

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asked that "Wolfe be required to look to the estate of the said James T. Carter for the payment of said claim, if it is not paid or barred." The statute is not relied upon or pleaded in Love's answer; and we hold in accordance with the opinion of Chancellor Kent, that presumptions of payment, founded on the lapse of time, are matters of evidence resulting from the facts of the case, and are not in many cases *proprio jure*, a matter of plea in bar. *Giles v. Baremore*, 5 J. C. R., 550.

In the answer of Wolfe, which was sworn to, although the oath of defendants is waived in the bill, it is distinctly and explicitly denied that "said note was or ever has been paid by said guardian, or the said James T. Carter, or any one else;" "and it is said that respondent never has been a very close collector, and whenever he considered his means in safe hands he generally left it there until he was compelled to have it; and, as payment, in fact, is not averred by either of the parties to the note, we hold, under the circumstances of this case, that the statement in the answer removes any presumption arising from the lapse of time.

Let the decree be reversed, and a decree be pronounced here for the balance due on the note, with interest and costs.

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R. WALTER & CO. v. G. R. McNABB and M. McNABB.

CHANCERY PLEADING. *Answer.* In a bill filed, charging a sale of goods as in fraud of creditors, there were special interrogatories, as follows: What amount of goods was received? whether anything was paid for the goods; and if so, when, where, and in what manner? An answer, stating that the vendor was indebted to the vendee, on account of payments made on debts of a previous partnership between them; that he proposed to the vendee to transfer, and the vendee agreed to receive, the goods in payment of the amount due and justly owing to him; that about the 1st day of Oct., he sent the goods—held responsive to the interrogatories.

FROM COCKE.

From the Chancery Court at Newport, SETH J .W. LUCKY, Ch., presiding.

R. McFARLAND, for complainant.

J. P. SWAN, for respondent.

NICHOLSON, C. J., delivered the opinion of the Court.

The bill in this cause was filed in the Chancery Court at Newport, to reach, by attachment, the value of a stock of goods in the possession of defendant, M. McNabb, and to subject the same to a debt due the complainants by defendant, G. R. McNabb. The goods had belonged to G. R. McNabb, and had been transferred by him to M. McNabb. The main question in the case, is, whether this transfer of the goods was fraudulent as to the creditors of G. R. McNabb.

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The bill alleges that the defendant, G. R. McNabb, is justly indebted to complainants, who are merchants in Baltimore, in the sum of \$4,398, for goods sold to him in 1866, to be used in his mercantile house at Columbia, S. C.; that during the last four months, before the filing of the bill, which took place on the 17th of Jan., 1867, defendant, M. McNabb, the father of said George R., and who was residing in Cocke county, Tenn., sent his wagons through to South Carolina, and brought to said county a lot of goods, and was engaged in merchandizing on them; that the goods were received from said George R. McNabb, and that they were part of his stock at Columbia, S. C., and possibly a part of the goods sold to him by complainants; that nothing was paid for said goods by M. McNabb, but that this was a fraudulent device, adopted to save this much of the stock at Columbia, S. C., from the claims of creditors. They do not know the amount the goods so brought, but suppose it was not less than \$3,000 in value. They allege, upon information, that defendant, George R., was on the eve of bankruptcy, if not absolutely insolvent, at the time of filing the bill.

The defendants are required to answer specifically the allegations of the bill, and then they are required to answer specific interrogatories—"let them answer, positively, what amount of goods were received by said M. McNabb from said George R., and whether anything was paid him therefor, and if so, when, where, and in what manner." The bill was sworn to by an agent of complainants.

The defendants answer on oath, separately. George R.

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McNabb answers, that about the 1st of September, 1866, he bought the goods of complainants, as charged, on a credit of four months; that after the goods were received in Columbia, S. C., a great and sudden decline took place in the price of goods, by which he suffered great loss, and that soon afterwards—about the 25th of December, 1866, he made an assignment for the benefit of all his creditors, of the proceeds whereof complainants received their *pro rata* share.

Defendant answers further, that his father, defendant M. McNabb, and himself, were indebted, at the beginning of the war, in about \$3,600, to various merchants in Baltimore, from whom they bought goods as partners, in Cocke county, Tenn.; that, by the operations of the war, the assets of the firm became unavailable or worthless, and that the debts remained unpaid; and that he, being absent from the State, the whole of said indebtedness had to be met and discharged by his father, which left him indebted to him in the sum of about \$2,500, estimating the indebtedness and interest at \$5,000. He answers, that after the war he went into the mercantile business at Abbeville, S. C., and was successful; that about the 1st of July, 1866, being entirely solvent, owing no debts, except the one aforesaid to his father, and having a remnant of goods at Abbeville, and being desirous to save his father harmless, and to pay him the said amount of \$2,500, due and justly owing to him, he proposed to his father to transfer and sell to him the said remnant of goods, in payment of said amount; that his father at first refused, but upon his assuring him that it would not interfere with his prospects in busi-

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ness, his father finally agreed to receive the goods, as proposed. He states, that about the 1st of October, 1866, he invoiced to defendant, M. McNabb, by railroad, to Greenville, S. C., goods amounting to \$2,890, said invoices being stamped and receipted in full; that the greater portion of said goods were the stock of remnants before mentioned, and the balance from the stock subsequently purchased; about the 1st of September, 1866, but that none of the goods bought of complainants were included in the invoice.

Defendant denies, positively and absolutely, that the said transfer to his father was fraudulent, but avers, positively and absolutely, that it was *bona fide*, honest, and alone for the payment of his indebtedness, as aforesaid, and that it was so received and receipted for by his father. Defendant, McNabb, answers; that after Geo. R. had done a prosperous business at Abbeville, S. C., he wound up there, and went into business in Columbia, S. C., and failed, and made an assignment for the benefit of his creditors; these things he states on information. He says that he had but one transaction with his son, and that was whilst his business was prosperous, and when he was not embarrassed, and had paid for all the goods sold to defendant; and that this transaction was fair, open, *bona fide*, and for a valid consideration. After detailing the failure of the business in which defendants were engaged in Cocke County, Tennessee, before the war, defendant says, the amount of their indebtedness was about \$3,600; that before the war was fairly over, their creditors sued them in the Federal Court, and obtained judgments against him

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alone; that about the 1st of July, 1866, the said Geo. R. proposed to let him have a remnant of goods he had at Abbeville, to assist him in paying off their Baltimore debts, and proposed shipping them through, by railroad, to Greenville, S. C.; that he refused, until assured by George R. that he was not embarrassed, and could spare the goods without detriment to his business; with this assurance, and agreement that the proceeds should be applied to the said George R's liabilities, to their Baltimore creditors, and the amount defendant had paid for him, toward their indebtedness, he agreed to receive the goods; that in pursuance to these stipulations, the said George R. sent the goods to Greenville, S. C., where defendant received them; that the said George R. being then solvent, sold and transferred all of said goods to him, for the express purpose of enabling him to pay off said debt, and that as soon as they were received, he began the sale and application of the proceeds to said debts, until stopped by the injunction. He denies all the allegations of fraud.

There was but one deposition in the case. This witness says he went to Columbia, South Carolina, in January, 1867, took all the assets of George R. McNabb, carried them to Baltimore, and there disposed of them and distributed the proceeds, *pro rata*, and that the share received by complainants was \$733; that he examined the books of George R. McNabb, after the merchandise had been shipped to Tennessee, and they contained no record of goods debited to M. McNabb, whilst they professed to contain a record of all the goods that had been sold on account of George R. McNabb;

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that the debts due by George R. McNabb, in Baltimore, were mainly created between the 20th of August, 1866, and the 10th of October, 1866, and amounted to over \$53,000.

The first question for our determination, arises upon the allegations and interrogatories in the bill, and the responses thereto, in the answers. Are the matters stated in the answers responsive to the allegations and interrogatories, or are they merely in avoidance? The allegations are, that defendant, M. McNabb, received the goods from defendant, George R. McNabb, and that nothing was paid therefor; and the special interrogatories are: "Let them answer positively what amount of goods was received by said M. McNabb, from said George R. McNabb, and whether anything was paid therefor; and if so, when, where and in what manner?" George R. McNabb says, in answer: About the 1st of July, 1866, he proposed to transfer, and defendant, M. McNabb, agreed to receive, the goods at Abbeville, to the amount of \$2,500, in payment of that amount due and justly owing to him; and that about the 1st of October, 1866, he invoiced and sent the goods to Greenville, South Carolina, for M. McNabb. Defendant, M. McNabb, answers, that about the 1st of July, 1866, defendant, George R. McNabb, proposed to let him have the remnant of goods at Abbeville, South Carolina, to assist him in paying off their Baltimore debts, and to ship them by railroad to Greenville, South Carolina; that, in pursuance of the agreement, that the proceeds should be applied to the said George R. McNabb's liabilities to their Baltimore creditors, and the amount de-

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fendant, M. McNabb, had paid for him toward their indebtedness, the goods were sent by George R. McNabb, to Greenville, South Carolina, and received by defendant, M. McNabb.

These answers are responsive to the interrogatories, "whether any thing was paid for the goods, and if so, when, where and in what manner?" and are, therefore, evidence for the defendants, and not merely matter in avoidance. 10 Yer., 105; 5 Hum., 446; 4 Cold., 292; 2 Daniel Ch. Pl. & Pr., 938, n. 2.

As there is no other evidence made by complainants, overthrowing the evidence of the defendants, we are bound to conclude that, about the 1st of July, 1866, an arrangement was made between them by which the goods in controversy were transferred from George R. McNabb to M. McNabb, either in payment of the liability of the former to the latter, or as an indemnity against loss by reason of said liability. This arrangement was perfected about the 1st of October, 1866, when the goods were delivered. The title of defendant, M. McNabb, became thereby complete and valid as against the claim of complainants, unless the transfer was vitiated by fraud on the part of the defendants.

The allegation that the transfer was fraudulent is positively denied by the defendants, and this denial being responsive, becomes evidence for them of the fact. But the evidence is subject to be rebutted and overturned either by admissions and statements in the answer, or by witnesses. It is insisted for complainants that there are admissions and statements in the answer from which, in

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connection with the proof, fraud may be deduced, notwithstanding the denials of the answers.

The first admission relied on is, that defendant, Geo. R., at the time of the transfer, was on the eve of bankruptcy, if not wholly insolvent. Complainants do not so charge in their bill; this charge in the bill refers to the date of its filing, July 17, 1867. Both defendants admit that Geo. R. was insolvent when the bill was filed, but say that he was unembarrassed and owed nothing on the 1st of July, 1866, when the contract for the transfer of the goods was made; that after the purchase of the goods in Baltimore, for his business house in Columbia, S. C., which purchases are shown to have been made between the 20th of August and the 10th of October, 1866, he became embarrassed by the sudden and great decline of the prices of goods, and that he made an assignment about the 25th of December, 1866. There was nothing indicating fraud in appropriating the remnant of goods at Abbeville, to the satisfaction of his old Baltimore debts, for which his father was jointly liable. The fact, that, shortly after making this transfer, he bought of complainants and others in Baltimore, over fifty thousand dollars worth of goods on a credit, may prove that he was a bold and rash speculator, and that the Baltimore merchants were either equally rash in extending to him credit to so large an amount, or that they concurred with him in believing that the speculation promised to be successful, but it does not satisfy us that defendants were guilty of fraud in the arrangements of July 1, 1866, as to the

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remnant of goods at Abbeville; or that defendant, Geo. R., made the large purchase in Baltimore, with the fraudulent purpose of cheating complainants and his other creditors. Nor does the fact, proven by one witness, that the books of defendant, Geo. R., at Columbia, showed no entry of goods debited to defendant, McNabb, establish fraud. If the Abbeville goods were disposed of on the 1st of July, 1866, to McNabb, they constituted no part of the stock at Columbia, and therefore the failure to enter the transaction on the books at Columbia, tends as much to prove the genuineness of the transaction of July 1, 1866, as it does to show that the omission was fraudulent.

It follows, that, as complainants failed to sustain their allegations of fraud, they are in no condition to contest the title of defendant, M. McNabb, to the goods: Upon the whole view of the facts and the law, we are unable to concur in the conclusions of the Chancellor, and therefore we reverse his decree, and dismiss the bill with costs.

JOHN RANKIN v. MARY CRAFT et als.

1. CHANCERY PLEADING. *Demurrer.* An objection to the jurisdiction of the Chancery Court must be taken by demurrer. It cannot be done by demurrer in the answer.
2. EVIDENCE. *Loan or deposit.* A note given to pay, written by complainant himself, a man of fair business capacity; a charge that he *still*

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has the money, without a charge that he kept it as a special deposit, and a failure to bring it into court, though worthless, are all circumstances against a deposit, clearly establishing a loan.

3. CONSIDERATION. Where complainant paid, and at the same time took back, Confederate notes, as a loan, the consideration should be referred to the original obligation.

FROM GREENE.

In the Chancery Court at Greeneville, SETH J. W. LUCKY, Ch., presiding.

J. G. DEADERICK, for complainant.

R. M. BARTON, for defendant.

R. MCFARLAND, S. J., delivered the opinion of the Court.

The complainant in this bill alleges, that on the 18th of August, 1865, a judgment was rendered against him by James Allen, a Justice of the Peace for Greene county, for about \$200 and costs, in favor of the defendant, Mary Craft; that he sent two men to the Justice, to pray an appeal for him, and to become his securities upon an appeal bond; but that some two or three weeks after the time for granting the appeal had elapsed, he discovered that, by mistake, their names had been entered as "stayors," instead of becoming his securities for the prosecution of the appeal. He charges that the judgment was rendered upon a note, or due bill, executed by himself, under the following circumstances:

In January, 1863, he bought of said Mary Craft a check on the Bank of Lynchburg for \$480, or \$485, in

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Confederate money; and after he had paid her for it in full, partly in a debt she owed him, she requested him, as a friend, and as a matter of accommodation, to take back and keep for her, as a deposit, \$240 of the money. To this he consented, and executed the due bill, which which was intended merely as a receipt, or evidence of deposit, but, by mistake or ignorance, it was executed as implying an indebtedness; that this due bill was subsequently credited with \$40, the price of a cow he had sold to her; that he had twice offered her the money before she sued, but she refused to receive it. Upon these grounds, he prays a perpetual injunction.

There was no demurrer to this bill, except in the answer, the respondent says: "She is advised, and will insist, that the complainant's bill is demurrable, because the question submitted in it is one in which a court of law had jurisdiction, and that this Honorable Court has no jurisdiction after a fair trial at law," and then proceeds with the answer. This cannot be regarded as a demurrer to the jurisdiction of the Court. A demurrer upon this ground must be a demurrer *proper*, and not a demurrer embodied in the answer. Under section 4319 of the Code, a defendant may rely upon matters of demurrer in his answer, but this does not apply to a demurrer to the jurisdiction. *Bennett v. Wilkins and Gordon*, 5 Cold., 240. Whether or not the true ground for a demurrer as presented in this bill, was the want of jurisdiction in the Court, or that from the face of the bill, it appeared that the question had been adjudicated at law, we will not determine, but will see whether the complainant is entitled to any relief upon

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the merits of his case. Was the transaction intended to create a debt or obligation to pay, upon the part of the complainant, or was it a mere deposit, as he alleges? In the first place, the note or due bill, which must be regarded as the highest evidence of the contract, decides this question against the complainant. It is an obligation to pay \$240 in currency on demand, and this is strengthened by the fact that this due bill was written by the complainant himself, and he is shown to be a man of fair business capacity. Again, the complainant in his bill omits a very important allegation, in order to make a case of special deposit, as he insists, although he charges that he still has the money; he does not charge that he kept the same as a special deposit, separate from his own funds; nor does he bring the same into court with his bill. This would have gone far to strengthen his case, notwithstanding the fact that, at the time this bill was filed, Confederate notes were worthless. The answer denies the case made by the bill, and insists that the due bill was given for the balance due her on the check, and created a debt or obligation on the complainant to pay the same on demand, in currency. The proof does no more than to show, that the complainant took the Confederate money back, after he had paid it to defendant at her request, to keep for her, she saying she was afraid of being robbed. This is not inconsistent with the position assumed by the defendant, that he kept it as a loan, and does not make out the complainant's case. The fact stated in the bill, that the complainant twice offered to pay the Confederate money and was refused, goes rather to weaken than

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strengthen complainant's case. It is next argued, that complainant should be relieved, upon the ground that the consideration of the due bill was Confederate money. Complainant bought the check of the defendant, and paid her Confederate money; but immediately, at her request, and as a part of the same transaction, took back \$240 of the same Confederate money, and gave her a due bill for the amount. It might very fairly be assumed that the consideration of the due bill, was the balance of \$240, due on the check, which is not shown to have been for Confederate money. If it should be a question of doubt, the law would imply that the contract was founded upon the legal, rather than the illegal, consideration. But this question is not important now; for, under the decision made at the present term, this, under the facts in the case, would be no defense if clearly proved.

Affirm the decree.

ALEXANDER A. TALLEY v. WILLIAM COURTNEY.

CONTRACT. *Reformed on Answer.* Note for \$2,050 which may be discharged in current bank notes, reformed to read payable in current bank notes, on the admission in the answer that such was the contract.

FROM JEFFERSON.

From the Chancery Court at Dandridge, before S. J. W. LUCKY, Ch.

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BARTON & McFARLAND, for complainant.

J. T. SHIELDS, for defendant.

SNEED, J., delivered the opinion of the Court.

The bill is filed to reform a promissory note which, by a mistake of the draftsman thereof, does not contain the contract of the parties. The note is of date the 8th January, 1863, and promises to pay the defendant \$2,050, which may be discharged in current bank notes twelve months after date. The allegation is that the defendant, a citizen of Jefferson county, had a public sale of negroes on the 8th January, 1863, in said county, and caused it to be announced by the auctioneer at the time and place, that the sale would be on a credit of twelve months; and that he would receive current bank notes in payment. The answer admits that such is the fact; that it was understood and agreed between the vendor and the purchasers at the sale that the slaves were to be paid for in current bank notes, but insists upon the right of respondent to be paid in United States currency, which the answer alleges was the currency of the country at the time of the maturity of the note.

The complainant bought at the sale, a negro woman and her two children, which were bid off to him at \$2,050. The auctioneer wrote the notes that were given by the purchasers. The note of the complainant was written for the sum stated as two thousand and fifty dollars, which may be discharged in current bank notes.

The note of another purchaser was written by the purchaser himself for so "many dollars in current bank

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notes," and seems to have been accepted by the defendant as embodying the contract. It is abundantly shown in the proof that the understanding and intention of all parties was, that the slaves were to be paid for in current bank notes; that the contracts were made with special reference to the notes of certain State banks then current in that locality; and that the price agreed to be paid which seems extravagant, if not fabulous, in view of the uncertain character of such property at the time, was referable to the fact that Southern bank paper was lapsing at the time, into gradual depreciation. It was shown, also, that among the business men and the people the terms "current bank notes" meant such Southern bank paper as circulated in that vicinity at par before the war, and that of this character had been the bank paper then circulating. That when the note fell due, and for two months thereafter, the same bank paper was still current, though much depreciated. It is shown, also, that an effort of complainant to make a payment on the note, a few days after its maturity, was prevented by respondent's absence from home. The bill seeks an injunction of a suit at law upon the note, already begun by defendant, and the adjustment of the rights and equities of the parties in the Court of Chancery. The decree of the Chancellor was in favor of the complainant, from which the defendant has appealed.

The jurisdiction of a court of equity to reform a written contract of any grade or dignity, whether sealed or unsealed, upon parol evidence, when mistake or fraud has intervened to defeat the intention of the parties,

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has never been seriously questioned in Tennessee. 9 Yerg., 266; 2 Hum., 72. Though doubt and controversy have grown out of the doctrine, yet they are to be referred to the difficulty of reconciling this ancient prerogative of a court of equity with the inexorable and sometimes subtle doctrines of the common law, which rejects parol evidence to alter or control written contracts. In the case of *Henkle v. Royal Assurance Co.*, 1 Vesey, 314, Lord Hardwick observed, that there is no doubt but this Court has jurisdiction to relieve in respect of a plain mistake in contracts in writing. So that if reduced into writing contrary to the intent of the parties, on proper proof, the mistake would be rectified. In the case of *Hunt v. Rousmanier's Adm'rs*, 1 Pet., 1, the Supreme Court of the United States use this language: "There are certain principles of equity applicable to this question, which, as general principles, we hold to be incontrovertible. The first is, that when an instrument is drawn and executed, which professes or is intended to carry into execution an agreement, whether in writing or by parol, previously entered into, but which by mistake of the draftsman, either as to fact or law, does not fulfill, or which violates the manifest intention of the parties to the agreement, equity will correct the mistake so as to produce a conformity of the instrument to the agreement." *Vide* 7 Curt., 423, 424; 1 Greenl. Ev., 152; 2 Johns' C. R., 585; 1 Hum., 433; 8 Hum., 230; 11 Hum., 355; 1 Head, 230.

The great difficulty in such cases, arises upon the

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evidence. The "proper proofs" referred to by Lord Hardwick mean something more than cogent inference or strong probability, generated by the evidence.

The case must be made out by proofs entirely satisfactory, says Mr. Justice Story. "For," said he, "if the proofs are doubtful and unsatisfactory, and the mistake is not made entirely plain, equity will withhold relief, upon the ground that the written paper ought to be treated as a full and correct expression of the intent, until the contrary is established beyond reasonable controversy. 1 Story Eq. Jur., § 152. But the distinction to be observed is, that there can be no relief in equity when there is a mere misapprehension as to the matter of law, as when the mistake is as to the legal deduction from the facts truly recited. 2 Hum., 72, 78, 148, 151. In this case, the mistake is in the recital of a fact as to the manner of payment, which was in positive violation of the contract of the parties.

Now, it is true that the words, "current bank notes" have been interpreted to mean that which circulated as money, and which, in the absence of proof to the contrary, is presumed to be of value equal to money. *Baker v. Jordon*, 5 Hum., 486. But it was legitimate to prove in this case, by parol, what meaning the parties themselves intended to fix upon those words, and to show that they contracted with special reference to the bank notes then the circulating medium of the country where the contract was made. *Thorington v. Smith*, 8 Wal., 12.

We are of opinion that the complainant is entitled

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to the relief sought, and that he has fully made out his case by "proper proof," in the sense of the law.

The decree of the Chancellor is affirmed, and the case remanded to the Chancery Court at Dandridge for further proceedings.

WILLIAM NEWLAND and J. H. VANCE v. S. D.
GAINES *et als.*

1. CHANCERY SALE. *Assignee of purchaser becomes party by what.* A purchaser at Chancery sale becomes a *quasi* party to the suit, upon the report of the Clerk and Master and his purchase notes. An assignee of the purchaser, in like manner, becomes a party, upon a report of the assignment by the Clerk and Master, or upon being recognized by the Court; but upon an agreement in *pais*, not filed as evidence, or regularly made part of the record, such assignee cannot prosecute an appeal.
2. SAME. *Same.* An assignment of a bid, after the sale had been set aside and the biddings opened, and a sale had, is a sale of "pretended claim," and is illegal.
3. IDENTITY. Identity of a name treated as evidence of identity of person.
4. APPEAL. *Error not presumed.* A sale set aside upon reasons presented by petition and affidavit, will be presumed, in the absence of a bill of exceptions, to have been properly set aside.
5. CHANCERY PRACTICE. *Decree nunc pro tunc.* Decree entered *nunc pro tunc* in Chancery, held proper.
6. SAME. *Opening biddings.* That the price was grossly inadequate, and that the parties interested did not attend the sale—one, because he was attending on a sick member of his family; the other, because he had no notice; that the property was sold at the court house, when it would

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have brought a better price on the premises, and that it was sold without "notice in the proper newspaper," are reasons which will support an application to open biddings before confirmation.

FROM SULLIVAN.

In the Chancery Court at Blountville, J. P. SWANN, J., presiding.

The reasons presented in the petition, which the Court say, in the opinion, are sufficient to authorize the opening of the biddings, were, that the price was grossly inadequate, and that the parties interested did not attend the sale—one, because he was attending on a sick member of his family; the other, because he had no notice; that the property was sold at the Court-house, when it would have brought a better price on the premises, and that it was sold without "notice in the proper newspaper."

J. G. DEADERICK, C. R. VANCE, R. M. BARTON, and S. T. LOGAN, for Newland and Vance.

H. H. INGERSOLL, for A. Gibson.

DEADERICK, J., having been of counsel, did not sit in this case. R. MCFARLAND, S. J., delivered the opinion of the Court.

Under a decree pronounced in this cause, at Blountville, certain lands in Sullivan county were sold by the Master on the 27th of July, 1868, and bid off by James M. Davault, for \$425, all of which appears from the Master's report, filed the 8th of August, 1868.

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At the first term after this sale, the November Term, 1868, no decree was entered of record. There appears in the transcript, exceptions to the sale, by the complainant, but there is nothing to show when they were filed. On the 19th of February, 1869, the Master filed his report, reciting that, at the November Term, 1868, said sale had been set aside, and the biddings opened upon the application of complainants, Newland and Vance; and that in pursuance of this decree, the biddings had been opened and the land sold, on the 18th of February, 1869, to W. N. Vance and Wilburn Newland, for \$1,436. At the May Term, 1869, the cause was heard upon both reports of sale and exceptions, and a decree rendered setting forth, that at the November Term, 1868, a decree had been rendered by the Chancellor then presiding, opening the biddings, and directing the same to be kept open for three months; but by accident or mistake, said decree was not entered of record, and orders that said decree be entered *nunc pro tunc*. This latter decree adjudges that the first sale be set aside, and the latter sale be confirmed. From this decree, Andrew Gibson, who the decree recites, is the assignee and vendee of James M. Davault, the purchaser at the first sale, prays and obtains an appeal to this Court.

A purchaser at a Chancery sale becomes so far a party to the cause, as to authorize him to appeal from any subsequent decree affecting his rights. The report of the Master and the notes for purchase money, is the record upon which he becomes a party to the cause; an assignment of the bid by the purchaser, reported by

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the Master, or authorized by the Court, would doubtless authorize the assignee of the purchaser to take the place of, and be entitled to, the rights of the latter.

The evidence upon which Gibson claims the right to the land, and to litigate the question in this cause, is an agreement entered into between Davault and himself on the 23d of February, 1869. This agreement is transcribed in the record, though it does not appear to have been filed as evidence, or made a part of the record in any regular mode. But this objection out of the way, the agreement itself can not be recognized as valid, or as giving Gibson any status in court. It shows upon its face, that it was executed after the sale to Davault had been set aside by the Court, and after the land had been resold to Vance and Newland. And although it does not say so in terms, yet it bears unmistakable evidence of the fact, that this was well known to both Davault and Gibson at the time this agreement was entered into. It recites, that, at the November Term, 1869, "an effort was made to set aside my purchase, although I had in good faith complied with the terms of sale. I claim the property under my purchase, and as no record appears in the proceedings of November, 1868, of said Court setting aside said sale, I demand that a faithful compliance of the contract be enforced by the Court," &c.

This agreement further provides, that Gibson "is to prosecute the case at his own expense; that he may appeal to the Supreme Court," etc.

There appears, also, in the record, an affidavit made by "A. Gibson," which seems to have been used upon

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the motion to open the biddings, although the date of it is not given. This affidavit states that the property is worth one thousand dollars or more, and that a confirmation of the sale at \$425 would be manifest injustice to the parties. We are left to infer that the said "A. Gibson," who makes the affidavit, is the same man who appeals in this case. Nothing appears to the contrary. It is clear, therefore, that Davault and Gibson discovered that the decree of the November Term, 1868, had not been entered of record; and supposing this to be a fatal omission, Davault, by this contract, sells his "pretended claim" to Gibson—a claim that they then both knew had been declared invalid. This was, in substance, an effort, upon the part of Gibson, to purchase Davault's interest in a law suit. The contract is illegal, and can not be regarded as giving Gibson any status in court. This result is clear, from principles so familiar that it needs no illustrations or authority to sustain the proposition. Davault's notes had been previously surrendered to him, as appears from the decree; and the notes of Gibson; which are filed by him with the agreement before referred to, have never been accepted by the Master.

If Gibson stood in an attitude before us to have the cause reviewed, we should entertain no doubt of the correctness of the Chancellor's decree.

It is argued, upon the authority of the case of *Johnson v. Quarles*, 4 Cold., 615, that mere inadequacy of price is not sufficient to set aside a Master's sale, even before confirmation; that there must be accident, fraud, or some other circumstances making it inadequate to confirm the sale. Without inquiring as to the correctness

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of this authority, at present, we think it clear that satisfactory reasons were made to appear in this case, why it would have been inequitable and unjust to confirm the first sale.

The action of his Honor purports to have been founded upon reasons, presented in the petition of the complainants and affidavits. There is no bill of exceptions setting forth the affidavits, or making them a part of the record; and we would presume, unless the contrary appeared, that the reasons presented justifies the action of the Court. There are affidavits, however, copied in the record; and assuming that these were all, we think they present ample reasons for opening the biddings. They show that the parties in interest were prevented from attending the sale, by reasons that, under the circumstances, are a sufficient excuse; and in a case like this, where lands in which minor children have an interest, have been sold for a grossly inadequate consideration, we think his Honor would have erred had he acted otherwise.

But for the reasons before stated, we hold that Gibson, the appellant, is not entitled to a review of this cause, and we dismiss his appeal, and enter a decree against him and his security, for the costs of this Court.

The cause will be remanded, to be proceeded with.

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MAHALA RUCKER *et als.* v. R. P. MOORE *et al.*

1. CHANCERY JURISDICTION. *To enjoin void decree.* A bill in Chancery lies to enjoin an execution from the County Court, issued on a void decree or judgment by motion against a purchaser at a sale.
2. PRACTICE. *Oath to bill. No publication without. Guardian ad litem.* A bill to sell slaves, filed in the County Court, *not sworn to*, does not authorize the appointment of guardians *ad litem* for infants, nor publication as to non-residents.
3. INFANT. *Decree without service. Appearance of guardian ad litem.* An answer by a person as guardian, *etc.*, where the record shows that there was no guardian when the bill was filed, but the bill promises to procure one at the next term; with no record to show that such regular guardian was appointed, and no order to appoint a guardian *ad litem*, and no service of process on the infant, will not support a sale.†
4. REVIVOR. *Sci. fa. After.* A revivor on motion, at the term when the death of the ancestor is proved, against his widow and heirs at law, is void, and a *scire facias*, issued afterwards to warn them, is a nullity. As to infants, such a proceeding will not authorize the appointment of a guardian *ad litem*, and his appointment and answer will not confer jurisdiction.
5. PARTIES. *Personal representative.* The personal representative of a distributee, if not a party absolutely necessary in a bill to sell slaves, was a highly proper one.
6. PRACTICE. *Guardian ad litem, Appointment.* The appointment of a guardian *ad litem* "for the minor heirs" of a deceased party, not naming them, is a nullity.
7. PUBLICATION. *Evidence to disprove.* There being a positive charge that the sale was made without any publication, the commissioner, who was principal defendant, answering that he has no recollection of any publication, but supposes he made it, because it was his duty to do so, no order for publication or proof of publication being in the record, is evidence that there was no publication.
8. CHANCERY SALE. *Property of infant. Proof to authorize.* The evidence of witnesses, not acquainted with the property, who gave their opinion as to the propriety of a sale without assigning any reason, is not proper evidence on which to decree a sale of property of minors.
9. DECREE. 'SALE. *Notice or advertisement.* A decree of sale not directing any notice or advertisement, and no sufficient evidence appearing of notice or advertisement, is not proper.

†See *Taylor v. Walker*, post 734; Heiskell's Dig., § 564, p. 564.

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10. SAME. SAME. *Appointee to sell.* So of a decree that A. B. sell without showing in what capacity or office he is to sell.
11. SALE. PURCHASER. *Not compelled to complete void sale.* Where the proceedings under which a sale is made are absolutely void, the purchaser cannot be compelled to accept the title, and he may be discharged.
12. JUDGMENT BY MOTION. *Against purchaser in County Court.* A judgment or decree of a County Court, by motion against a purchaser of property under a decree of that court, must recite all the facts necessary to give the Court jurisdiction, and to authorize the judgment.
13. SAME. *Defects in.* A judgment entitled in the name of the commissioner to sell v. the purchaser and the securities for the purchase notes, and describing the plaintiff as commissioner in "this cause"—not in the original cause—is void.
14. SAME. SAME. *Not aided by other records.* The record of the original cause cannot be looked to in aid of the judgment.
15. SAME. *Requisites of.* The judgment must recite the appointment of the commissioner to sell, by what court made, by what authority he is to sell, in what suit, for whose benefit, and for what purpose, that the proper parties are before the Court, and the order or decree for sale.

FROM GRAINGER.

Appeal from the decree of S. J. W. LUCKY, Ch., in Chancery at Rutledge.

W. R. EVANS, for complainant.

JAMES T. SHIELDS, for respondent, insisted upon the fact of Mahala Rucker, the purchaser, having been the guardian *ad litem*, in the original cause. That the County Court was not an inferior court; and cited Meigs' Dig., p. 341; 6 Hum., 133; 7 Hum., 168; 11 Hum., 447; *Hopper v. Fisher*, 2 Head, 253; *Gilchrist v. Cannon*, 1 Cold., 587; *Tipton v. Powell*, 2 Cold., 19.

TURNEY, J., delivered the opinion of the Court.

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The decree of the Chancellor declaring void the proceeding of the County Court, and perpetually enjoining the execution from said court, is a proper one.

In the latter part of the year 1861, Coalby Dalton and J. H. Dail, administrators of the estate of John Rucker, deceased, and Cornelia Dail, wife of said J. H., filed their bill in the County Court of Grainger County, against Mahala Rucker, the widow, and Perry Rucker, Barnett Farmer and wife, Mary, formerly Rucker; Nelson Rucker, Martha Rucker, Frank Rucker, James Rucker, Ruth Rucker, and Robert Rucker, the last five minors, without regular guardian, and also Isaac Payne and wife Mahala, residents of Kentucky; James Hodges and wife Emily, and John Rucker, residents of Texas

The defendants, and complainant, Cornelia Dail, are the widow and children and heirs at law of Jno. Rucker, deceased.

The bill seeks to sell ten slaves belonging to said estate, for partition, upon the ground that they can not be divided, and "that a sale for division is indispensably necessary;" it charges that the minors have no regular guardian, but that application will be made at the next ensuing term, for the appointment of one; it prays that publication be made, and if no regular guardian be appointed, that guardians *ad litem* be appointed for the minors, &c. The bill is not sworn to. There is nothing in the record showing the appointment of regular guardians, or guardians *ad litem* for the minors. In January, 1862, a paper purporting to be the answer of the minors named above, is filed, and commences: "These respondents, answering by their guardian, say," &c., and

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this is not subscribed to by any one. The affidavit there-to, in the usual form, is sworn to by Mahala Rucker.

At the February Term, 1862, this order appears: "In this case, the death of Perry H. Rucker is suggested and proved to be true; and on motion of complainants, it is ordered the cause be revived against Minerva N. Rucker, his widow, and John W. Rucker, Mary A., Virginia and Sarah M. Rucker, his children and heirs at law, and that *scire facias* issue to warn them."

At the March Term, 1862, this order appears: "In this case, it appearing to the Court that *scire facias* has been regularly served on the widow and heirs of Perry Rucker, and the widow failing to answer, judgment *pro confesso* is entered against her, and on motion of complainant, L. M. Ellis is appointed guardian *ad litem* of the minor heirs of said Perry Rucker; and it is further ordered, on motion, that judgment *pro confesso* be entered against the other defendants, except Mahala Rucker, guardian, &c., who has filed her answer; and there-upon the said L. M. Ellis, guardian, &c., files his answer."

The appearance of Ellis, even though he had been properly a guardian *ad litem*, did not affect the minors, nor bring them before the Court, as he could not, by any act of his, waive the service of process. 1 Swan, 75; 2 Swan, 197.

The personal representative of Perry Rucker is not before the Court, formally nor informally; that he should have been, if not absolutely necessary, was highly proper.

The suit in the County Court was revived against the widow and heirs of Perry Rucker on mere motion, and

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without the issuance of *scire facias*, and amounted to no revivor.

By the terms of the order proposing to revive against the widow and heirs of Perry Rucker, and after the revivor, a *scire facias* is directed to "issue to warn them." We are wholly unable to discover any necessary office of a *scire facias* at this stage of the proceedings, and declare it to have been a nullity.

The order appointing a guardian *ad litem* "for the minor heirs of Perry Rucker," not naming them, is a nullity. 1 Swan, 484. The answer of the guardian *ad litem*, Ellis, did not cure this error. No guardian *ad litem* could have been properly appointed until after service of process upon the minors, bringing them before the Court, and making them parties.

There was no publication as to non-residents—the principal defendant in the suit, and the Clerk or Commissioner who sold the slaves, saying, in his answer, he has no recollection of it, and cannot say, from his memory, that he did make publication, but supposes he did so, because it was his duty to have done so. This is said in response to the positive allegation of the bill in this cause that publication was not made. There is in the record no order for publication. The sale is ordered upon the report of the Clerk, based upon the testimony of two witnesses, neither of whom seems to have known the slaves, and who simply gave it as their opinion, without assigning any sufficient reason, that "the slaves should be sold, and the proceeds distributed and placed at interest for said minors."

By the decree, no notice or advertisement of time of

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sale is directed, nor is there any sufficient evidence of notice or advertisement of sale. It directs "that R. P. Moore sell said slaves to the highest bidder," &c., without showing in what capacity or office he is to sell.

It is manifest, from the foregoing errors and omissions, that the sale of the slaves was absolutely void.

A purchaser at a sale under a decree of Court may demand a good title, and if the Court is able to give him that, he has no reason to complain that the proceedings are irregular; that is nothing to him. This, of course, can only be done when the parties interested are all before the Court, and a case is made out to give the Court jurisdiction; otherwise the Court could not decree him a good title, and for that reason would not compel him to pay his money. *Swan v. Newman*, 3 Head, 288.

All the parties in interest were not before the Court, by the proceedings in the County Court, nor is a case to give the Court jurisdiction made out, as we have already shown.

As once before said, the bill to sell was not sworn to. Section 2247 of the Code provides: "If any executor or administrator think it necessary to sell or dispose of any slave or slaves, for the payment of debts, or because it is for the interest of the legatees, or those entitled to distribution, to make sale, or because a division cannot be made among the legatees or distributees of the estate without a sale; in all such cases he shall file his bill or petition *on oath*, to obtain a decree for the sale of such slaves; and the suit so commenced shall be conducted as other suits in Chancery."

It was necessary to the appointment of guardians *ad*

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item, that the bill in the County Court should have been sworn to. And as to non-residents, before publication could be made or ordered, the fact of non-residence must appear, either by affidavit to the bill or petition, or by an independent affidavit of the fact, neither of which appears in the record.

The defendant, R. P. Moore, under the order of the County Court, sold the slaves of the estate of John Rucker, deceased. Complainant, Mahala, his widow, purchased six of said slaves, and gave her note, with security, for the sum of \$3,590.60. Judgment by motion was taken on said note, and execution issued. She, with her securities, have instituted this suit in the Chancery Court at Rutledge, to enjoin the enforcement of the execution, charging that the proceedings in the County Court are void.

The judgment of the County Court is void. By section 4205 of the Code, the County Court is empowered to "give judgments or decrees upon notes and obligations taken in the progress of a cause."

The County Court is empowered to render judgment upon notes taken as prescribed in the above section, upon motion and without notice. This being a summary proceeding, "every fact which is necessary to give the court jurisdiction and to authorize the judgment, must be set out in the judgment as having been made to appear." 5 Hum., 426; 3 Hum., 315; 3 Cold., 219.

The decisions of this Court, through a long series of years, have been uniform on this subject.

Does the judgment attacked in the bill fill the measure of this well defined and well settled rule? We

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think not. It is in the style, *R. P. Moore, Special Commissioner, v. Mahala Rucker*, and recites: "This day came the Commissioner in this case to sell the negroes belonging to the estate of John Rucker, deceased, and presented a note under seal on Mahala Rucker, J. H. Dail, T. J. Rucker, and N. J. Rucker, which was executed by said parties to R. P. Moore as Commissioner aforesaid, for six negroes, which said note is in the words and figures following,: \$3,590.60. Six months after date we or either of us promise to pay R. P. Moore, Clerk and Commissioner, who sold the slaves belonging to the estate of John Rucker, three thousand five hundred and ninety dollars and sixty cents. This note is executed for boy Westley, girls Harriet, Letta and Amanda, and two children, and a lien is declared on said negroes until the purchase money is fully paid. April 3, 1862. Mahala Rucker, her X mark [seal.] G. H. Dail, [seal.] J. T. Rucker, [seal.] N. J. Rucker, [seal.] And it appearing to the Court that said note is unpaid, on motion of said Moore by attorney, the Court is pleased to order that he recover of the said Mahala Rucker, G. H. Dail, J. T. Rucker, and N. J. Rucker, (the motion being made against all of said parties) the sum of \$4,107.14, (four thousand one hundred and seven dollars and fourteen cents), together with all the costs of the motion, for which execution may issue."

In this judgment it does not appear that such cause as that at its head is pending, and if we look to the record for proof of the existence of such cause, we do not find it; besides, the rules, as we have already seen, does not allow that we look to the record outside the

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judgment for this or other matter touching the regularity of the judgment.

The judgment does not show any appointment of Moore as Special Commissioner.

It does not show by caption nor in its body of what court Moore is Special Commissioner or Clerk.

It does not show under what authority he sold the slaves, nor at whose suit, nor for whose benefit, nor for what purpose.

It recites that the note was executed to Moore as Commissioner to sell the slaves belonging to the estate of Jno. Rucker, deceased, but does not recite nor refer to any proceeding in any court in which either the administrator or the heirs at law of Jno. Rucker are parties.

It recites no order or decree for the sale of the slaves, all which recitals are necessary to give the Court jurisdiction and to authorize the judgment.

There may be other objections to the judgment, but the sufficiency of those we have mentioned makes it unnecessary to notice them.

The decree of the Chancellor is affirmed.

JAS. TAYLOR *et al.* v. JAS. WALKER *et als.*

1. CHANCERY SALE. *Process. Service of, on infants.* A sale of land upon petition of the administrator to pay debts, without service of process upon infant heirs, who have no regular guardians, is void.
2. SAME. *Same. Proof of service.* Where neither the issue or service of process appear, by production of the process, nor by anything upon the

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dockets of the court, and they are not assumed in the decree, the decree for sale will be held void.†

3. SAME. *Same. Guardian ad litem.* Issue and service of process should precede the appointment of a guardian *ad litem*.‡
4. SAME. *Purchase by Administrator. Complainant.* Where an administrator buys at a sale procured on his own petition, proof of the utmost fairness will be required of him, or any purchaser under him, to sustain the sale ||
5. SAME. *Same.* Where the property is reported as sold to one "as administrator," it is held as evidence that the purchase was made in his official, not his personal character; and a subsequent decree, vesting him personally with the title, will be held not to pursue the master's report of sale, and he will be treated as a trustee.
6. STATUTE OF LIMITATIONS. *Evidence. Burthen of proof.* Where the intestate died in 1839, the bill to attack the sale was filed in 1859; the complainants state that, at the time of the sale, (in 1840,) they were small children and very young; and the answer made no response to this allegation; the burthen of proof to show that the complainants were of age more than three years before suit, was held to be upon the defendant.
7. ESTOPPEL. *Sworn petition and purchase.* An administrator stating a title in his intestate in a sworn petition, and purchasing at the sale, held estopped to deny the title of the heirs of his intestate.
8. VOID SALE. *Account on setting aside.* A purchaser at a void sale, who has bought in a dower interest, being charged with rents and profits, is allowed credit for the amount actually paid for the dower.

FROM BLOUNT.

Appeal from the decree of S. J. W. LUCKY, Ch., sitting in Chancery at Maryville. The original bill was filed 21st June, 1859.

C. T. CATES, for complainant, cited Acts of 1837, 1838, c. 111, s. 3; 1 Swan, 77. As to the deed to

† See *Rucker v. Moore*, ante 726.

‡ See *Ivey v. Ingram*, 4 Cold., 120, Acc.; *Mears v. Brown*, MS., Brownsville, 1868, contra per Milligan; *Elrod v. Lancaster*, 2 Head, 574; *Greenlaw v. Kernehan*, 4 Sneed, 371.

|| See *Martin v. Martin*, ante 644.—REP.

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Pride, he cited 2 Kent, 542, and n; 1 Dev. and Bat. Eq., 455; 7 Hum., 266, et seq.; 2 Story Eq. Jur., § 1228.

McGINLEY & HOOD, for defendants, insisted, among other things, that the burthen of proof to show that the disability of the complainants to sue continued until within three years before suit, was upon the complainants. That a void decree was a color of title under the statute of limitations. *Vance's Heirs v. Johnson*, 10 Hum., 214.

BROWN & CORNICK, on the same side, relied upon *Britain v. Cowan*, 5 Hum., 315; *Hopper v. Fisher*, 2 Head, 257; *Kilcrease Heirs v. Blythe*, 6 Hum., 390, to show that service of process ought to be presumed. Insisted that the fact disclosed in the record, that there were unsatisfied debts more than double the value of the land, showed the infants were not injured—citing *Stanley v. Nelson*, 4 Hum., 484; *Noe v. Purchapile*, 5 Yerg., 216.

NELSON, J., delivered the opinion of the Court.

Pleasant B. Taylor the ancestor of complainants, departed this life intestate in the year 1839, and James Walker was appointed his administrator in January, 1840. About the 6th of March, 1843, Walker filed a bill in the Chancery Court at Madisonville, to sell the tract of land described in the pleadings, for the payment of debts due from the estate. Under a decree of the Court, the land was sold at public sale on the 26th of February, 1844, subject to the dower assigned to the widow, and Walker became the purchaser, at the price of fifty dollars; and a final decree was pronounced

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on the 17th of March, 1846, vesting the title in him. The bill now before us was filed to set aside that sale. On the 10th of June, 1852, Walker conveyed the land in trust to Samuel Pride, to secure the payment of certain debts. In the progress of this cause, Pride, under leave from the Court, filed a cross bill for the purpose of setting up the deed of trust and having the land sold to satisfy the debts therein mentioned. The Chancellor dismissed the original bill, granted the relief prayed for in the cross bill, and the complainants appealed.

It appears that the land in controversy originally belonged to the defendant, Walker, who insists in his answer to the original bill, that some time before the death of his intestate he agreed verbally to convey it to the latter; that part of the purchase money was still due at the time of his intestate's death; that, laboring under a misapprehension as to his own rights, respondent filed said bill as administrator; that he bought the land at the Master's sale, in his personal and not in his representative character; that he subsequently purchased the dower estate allotted to the widow, and took possession soon after the decree, and has ever since held the land adversely, and that his title is protected by the statute of limitations of seven years.

For the complainants, it is insisted that the intestate had a good title to the land; that they were "all small children, and very young when their father died;" that they had no regular guardian; that the sale of the land, at the instance of the administrator, was void for want of personal service of process, and that the whole pro-

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ceeding, on the part of the administrator, was a fraudulent device to obtain the possession and title. It is further insisted that the defendant, Walker, purchased at the Master's sale, in the character of administrator, and that he held the land in trust for complainants.

It is a settled law of this State, that a sale without service of process on an infant who has no regular guardian, is void, and that the want of such service cannot be waived by the appearance of a guardian *ad litem*. See 2 Swan, 197; 1 Swan, 75; *Ibid*, 484; 1 Head, 128. The application of the principle to a case in which the validity of the sale is directly attacked by or in behalf of the infants whose land was sold, is not affected by the case of *Hopper v. Fisher*, 2 Head, 256, which was an action of ejectment, in which an effort was made to impeach the decree collaterally. In that case, the recital in the decree that the infants answered, by their guardian *ad litem*, was deemed sufficient, as against a naked trespasser, who had no interest in the land in dispute; but it was expressly said by the Court, that "we do not mean to question the rule that requires service or notice upon the parties, and that a decree contrary to the course of the Court, is void." In the case before us, the decree of Sept. 18, 1843, ordering a sale, recites that the cause was heard upon the bill, and the answers of the guardian *ad litem*; but it is not assumed in the decree, nor does it appear in any part of the proceedings, that process was either issued against or served upon the minors. The rule docket shows that W. B. Williams was appointed guardian *ad litem* at May Rules, 1843, but does not show publica-

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tion or any issuance or service of process, as required in *Robertson v. Robertson*, 2 Swan, 197, and *Crippen v. Crippen*, 1 Head, 129. It should have shown that the issuance and service of the process preceded the appointment of the guardian *ad litem*; and, in a case like this, where the administrator was both petitioner and purchaser, every fact necessary to establish the utmost fairness in the sale, should be established affirmatively by the administrator, or any purchaser or claimant under him. As he does not show that there was personal service of process upon the minors, we hold that the sale was void.

We decide further, that the other grounds of defense relied upon, cannot be maintained.

1. In the Master's report of the sale, it appears that the tract of land was "knocked off to James Walker, administrator aforesaid, for the sum of fifty dollars;" and we hold that this is evidence that he acted, in making the purchase, not in his personal, but in his official character. The decree subsequently vesting the title in him personally, was not in conformity to the Master's report. It is not difficult to suppose that bidders, who might be unwilling to bid against a person acting for minor children, would be willing to bid against him when acting in his own right. The administrator, therefore, held the title, if any, which he acquired at the Master's sale, as trustee, and not in his own right.

2. The complainants are not bound by the statute of limitations. Their ages are not established by any direct proof in the record. In the bill filed by the administrator, it was stated that the children were all minors, having no guardian. In his answer to complainants' bill,

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the administrator takes no notice of the statement that complainants were all small children, and very young, at the time of the sale. In *Lafferty v. Turley*, 3 Sneed, 157, it was held that an administrator is an express trustee, and that no statute of limitations will protect him against a proceeding to recover legacies or distributive shares due from him as such; and without deciding whether, in a case where the administrator purchases in his own name and for his own benefit, he is an express or implied trustee, we hold that, as he made the purchase in this case as administrator, the burthen of proof was upon him to show that all the complainants are of full age, and that they have, respectively, obtained their majority for a period sufficiently long to create the bar of the statute of limitations. As no direct steps were taken against the land by the creditors, the presumption is, that the administrator continued to hold for the heirs; and it was incumbent on him to show a disclaimer, or its equivalent, within a sufficient time after they became of age to perfect his title by the statute of limitations. It is not shown in proof that he disrobed himself of the character of trustee, by giving complainants notice of his adverse holding.

3. We are constrained to regard the whole conduct of the administrator in relation to the tract of land in controversy as fraudulent. The evidence shows that P. B. Taylor, the intestate, held the actual possession of the land for about twelve years before his death. There is some conflict in the testimony as to whether he actually held a deed for the land from the defendant Taylor, and there is much testimony in the record, *pro* and *con*,

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as to the character of two of the witnesses who prove the existence of a deed. Its probable existence is established by statements of two other witnesses and the evidence as to Taylor's admission, and we think there can be but little doubt of its existence, in view of the fact that Walker in his bill as administrator, charged that Taylor died seized and possessed of the land, and described it accurately by metes and bounds; that the widow of Taylor states in substance the defendant, Walker, received from her all the husband's valuable papers soon after his death; and that it is also in proof that Taylor was present when the Commissioners were engaged in allotting the dower, and furnished the boundaries of the land to them. It is possible that he may have obtained these from his old title papers, as he was formerly owner of the land; but he is unquestionably estopped by the statements in his own bill, which was sworn to, and his subsequent purchase at the Master's sale, to deny the existence of his intestate's title. It was a gross fraud on his part, to attempt afterwards to deprive the minors of their inheritance. The deed of trust to Pride communicated no other or better title than Walker himself held.

Let the Chancellor's decree be reversed and the title declared to be in complainants, who shall account for the amounts actually paid by Walker for the dower interest. Dismiss the cross bill, and remand the cause for an account against Walker as to the value of the rents and profits, out of which the amount actually paid for the dower interest shall be deducted.

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JOSEPH L. AND EDWARD A. ABBOTT v. JULIUS C.
FAGG.

1. APPEAL. *When matter of right.* An appeal lies as a matter of discretion, from the decrees of a Court of Chancery ordering an account, or a sale or partition, but as a matter of right from the last decree.
2. DECREE. *Power of Court over.* A decree pronounced, but not entered, is within the control of the Court.
3. CHANCERY SALE. *Power of Court over payment of debt.* At any time before confirmation of a Chancery sale, under attachment against a non-resident, it may be set aside, on payment of the attaching creditor's debt, though the bidder be a third person. Regularly, the application should be made before the confirmation ordered, but the party being thrown off his guard by a promise from complainant's attorney to take the money, it was allowed to be made afterward, during the term at which the confirmation was had.

FROM BLOUNT.

From the Chancery Court, at Maryville, S. J. W.
LUCKY, Ch., presiding.

GEO. ANDREWS, for complainant.

MCGINLEY & HOOD, and C. T. CATES, for defendant.

NELSON, J., delivered the opinion of the Court.

This attachment bill was filed on the 18th October, 1864, against Sessler & Fagg, to recover a debt of \$315.00. The attachment issued in the case, was levied

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on the 26th October, 1864, by the Sheriff of Blount, on certain lands described in his return. Judgment *pro confesso* was rendered 23d of May, 1865, as of the last rule day of the court. A decree was pronounced in favor of complainants, at the May Term, 1865, for \$389.92, and costs. It was directed, in the decree, that the Master, after having first advertised the time and place of sale, for four successive weeks in Brownlow's Knoxville Whig, and five public places in Blount County, should expose the lands attached, at public sale, to the highest bidder, and sell the same on six months' credit, in bar of the equity of redemption. A sale was made by the Master on the 25th of September, 1865, at which Joseph M. Greer became the purchaser, at \$400. The sale was duly reported, but on the 26th of December, 1865, it was set aside by order of the Chancellor, whose decree recites that the land was bid off by the purchaser at an inadequate price, and it was ordered that "the Clerk and Master proceed to re-advertise and sell said lands, or so much thereof as will be necessary to pay and satisfy complainants decree, upon a credit of nine and eighteen months, in equal instalments," &c.

The Master was directed, in the decree, to make report of sale at the next term; and the decree declares further, that, "at request of complainants, said sale, as in the original decree provided, shall be made in bar of the right of defendant, or any of their creditors or assignees, to redeem the same." In the progress of the cause, the Master made a further report, in which, among other things, he states that in pursuance of the

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last mentioned decree, "and in pursuance of notices given by me, [him,] for the legal space of time, in five different places in Blount County, giving the legal notices required;" he sold the land, in the pleadings mentioned, known as the Bicknell property, and lying in sight of Maryville, without survey, at public auction, at the Court-house door, on the 5th of March, 1866, within the legal hours, &c., to M. McTeer, at the sum of \$1,500, and took his notes, with security, retaining a lien for the purchase money. On the 11th of December, 1866, an order was made in the cause, declaring that "on application of complainants, they have leave to file an amended and supplemental bill, so as to bring in new parties who have liens on the lands attached in this cause, six months granted." No amended or supplemental bill was filed, but on the 13th December, 1867, a decree was pronounced, in which the report of sale is set out, and by which the same is in all things confirmed, the title of J. C. Fagg and Henry Sessler divested out of them, and vested in fee, in the purchaser at the Master's sale; in the same decree, judgment was rendered in favor of the successor of the former Clerk and Master, against the purchaser at the sale, and his security, for the sum of \$1,557.99, and an execution awarded; and it was directed that the Master should pay out of the moneys, when collected, the amount due complainants, and the costs, and that he should hold the balance subject to the direction of the court; and a writ of possession was awarded, to place said M. McTeer in possession of the premises. Near the close of said decree, it is stated that "in this cause,

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W. D. McGinley comes for the defendants, presented an affidavit, opposing the confirmation of the sale in this case, and the Court refused to set aside the sale; and the affidavit is made part of the record, marked Exhibit A, to the action of the Court refusing to set aside the sale; and from the decree in this case, the defendant, Fagg, prays an appeal," &c.

The affidavit of W. D. McGinley, thus made part of the record, states that, "on the first day of this term of the court, he had an interview with the respondent, Fagg, [who] sent him to Hon. O. P. Temple to settle the amount of this decree, and that a few moments after that affiant was informed by some of the parties that it was, or would be, arranged; that the money was to be paid, and that would be an end to the matter; then on Thursday, late in the evening, affiant was informed that steps were being taken to have the sale to McTeer confirmed. Affiant immediately went to his client, Fagg, and was informed by him that Friday morning was set by him and the said Temple to pay him (Temple) the money; but Fagg handed affiant the amount of the decree in favor of complainants, being about \$449. Affiant then came, before the decree in this case had gone down on the record, and tendered to the solicitor of complainants, Abbott, (Temple,) the amount of the decree. Affiant states that, at the time the motion was made to confirm the sale, he had not the least knowledge that such a thing would be attempted. Affiant states that these are, as he believes, good and valid objections to the sale, and these he would, for respondent surely have made, if he had not been off his guard, in the manner above stated.

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Affiant states that the sale is subject to exception, because the land was, when sold, levied on by a large number of other attachments from this Court, which are matters of record here, and from the Circuit Court of Blount; and so, at the sale, the land only brought \$1,500, which is a grossly inadequate price. Affiant states that it was then worth more than \$3,000. Affiant states, further, that, at the time of the sale, Fagg the respondent, and Sessler, were both driven from the country, and could not see to purchasing the land, or having it done. Therefore, affiant states that this sale ought not to have been confirmed.

No depositions were taken in the case. In the judgment *pro confesso* of 23d May, 1865, it is stated that publication was regularly made, requiring respondent to appear and defend; and, in the decree, which seems to have been pronounced on the same day, it is recited, that "publication has heretofore been regularly made, for four successive weeks before court, in Brownlow's Knoxville Whig and *Rebel Ventilator*," and that defendants are non-residents of the State. No reference is made to the fact of publication in the decree of 26th December, 1865, under which the second sale was made.

These are all the material facts appearing in the record, except that, upon the record, it appears that O. P. Temple filed the bill and signed the prosecution and attachment bond, as attorney for complainants.

For the purchaser, it is insisted that the decree at May Term, 1865, was a final decree, as judgment was then rendered for the amount of complainant's debt and costs, and a sale of the land then ordered. The rea-

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soning of the Court, in *Gill v. Creed*, 3 Cold., 297, unquestionably sustains this proposition; but that case was brought up by writ of error, and not by appeal. That opinion is supported by *Delap v. Hunter*, 1 Sneed, 101, and other cases determined before the enactment of the Code. The Act of 1835, c. 3, s. 17, Car. & Nic., 237, provided, that "whenever a decree shall be made, in any inferior court, having chancery jurisdiction, determining the principles involved in the cause, and an account shall be ordered to be taken, it shall be in the discretion of the Court below, to allow an appeal to be taken, before the account is made, to the Supreme Court," etc. This statute seems to have been incorporated into and enlarged by the Code, 3157, which does not restrict the appeal to cases of account merely, but extends it to decrees ordering a sale or partition. The provisions of that section of the Code are that "the Chancellor or Circuit Judge may, in his discretion, allow an appeal from his decree, in equity causes, determining the principles involved, and ordering an account, or a sale, or partition, before the account is taken, or the sale or partition is made; or he may allow such appeal on overruling a demurrer; or he may allow any party to appeal from a decree which settles his right, although the case may not be disposed of as to others."

Whatever may have been the previous decisions of this and other courts, it is manifest, from the very terms of this section, that, in the view of the Legislature, which enacted the Code, decrees ordering accounts, par-

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titions and sales, were not final, and that it required special legislation to authorize an appeal before the reports were made and the case finally disposed of. It is not obligatory upon us to consider the cases determined in other courts, or to review our own cases, before the Code. It is sufficient to declare, that, in our opinion, the intention of the Legislature was to allow the appeal as a matter of right, when the last decree is pronounced in a cause in the court below; and as a matter of favor, in the cases specified in section 3157, and that, in the case before us, the right existed when the decree was pronounced on the 13th of December, 1867, and the appeal then granted brings up the entire cause. This question has been also considered, at the present term, in the cases of *Mathes v. Meek & Simpson*,[†] and *Harrison & Brothers v. Farnsworth*,[‡] and its further discussion is not demanded by the facts of this case.

Without declaring any opinion upon the questions raised in argument, as to the validity of the levy, the mode of advertising the second sale, and the propriety of selling without the right of redemption; and without considering what was the effect, if any, of the leave granted, on the application of complainants, to file an amended and supplemental bill ten months after the second sale occurred; of their failure to file it, and of their delay, for twenty-one months after the sale, to obtain a decree of confirmation, we cannot ignore the strong statements made in the affidavit of W. D. McGinley. It might, perhaps, have been more regular to present the

[†]Ante 534. [‡]Post 751.

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matters contained in that affidavit in a petition for rehearing; but in reviewing the action of the Chancellor, we must consider the case just as it was presented to him; and, in this view, it appears that after the decree of confirmation was pronounced, but before it was entered of record, the amount due complainants was tendered to their attorney, and on this ground the confirmation of the sale was opposed, and the Chancellor was requested, but refused, to set the sale aside. There can be no question that the decree was perfectly within the control of the Chancellor. It had not been entered of record; and if it had been so entered, he could, upon good cause shown, or even if he had changed his own opinion, have set it aside at any time during the term. See *Timmons v. Garrison*, 4 Hum., 150.

The purchaser, at the time the affidavit was presented, had no title to the land. By the act of purchase he had submitted himself to the jurisdiction of the Court as to all matters connected with the character of purchase. Calvert on Parties, in Eq., 61, 62, m.; 15 Law Lib. He could have been relieved of his bid upon a proper application, and, if such were the fact, might have shown that no title could be communicated to him. His contract was not complete until confirmation of the sale, and even then the title was not vested in him, and the sale only was completed. Such would have been the legal effect of the decree of confirmation, if it had been regularly entered, and the term had passed without any objection or opposition. But while the term continued, and so long as the confirmation was in abeyance, we hold that it was within the power of the defendants,

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or either of them, to prevent the confirmation, by satisfying the amount of the decree against them, with interest and costs. Regularly, they should have paid, or offered to pay, the money into court, or should, at least, have deposited it in court, to await the result of the litigation; but, according to the statement of the affidavit, the defendants and their counsel were "thrown off their guard" by the promise made by complainant's solicitor to receive the money, and had no knowledge of the intention to take a decree until they were informed it had been pronounced.

From anything that appears in the record, the authority of complainant's attorney to receive the amount of their debt had not been revoked, nor had he ceased to act in that character. The defendants and their counsel had been lulled into security, and relied upon the promise which had been made; and we hold, that, under the circumstances, the Chancellor should have authorized the payment of the money into court, and should have directed the cancellation or surrender of the notes executed at the Master's sale. But, instead of this, a sale, which was made in the absence of defendants, who had been driven from the country, for less than half the value of the land, and when other proceedings were pending against it, that probably deterred bidders from bidding something like its true value, was confirmed before any of the purchase money was paid, a writ of possession was ordered, and the right of redemption had been barred by a previous decree.

Under all the disadvantages surrounding the sale, the land had brought an amount greatly larger than the

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debt of complainers; but as the purchasers had paid no part of the purchase money, it was impossible that they could have been injured by setting aside the sale. The decree of the Chancellor was inequitable, and calculated to do irreparable injury to the defendants. And proceeding to render such decree as we think he should have rendered, it is ordered that the decree of confirmation be reversed, and that a decree be entered in this cause, remanding the case to the Chancery Court at Maryville, to the end that defendants may, at any time before or during the next term of said court, pay to the complainers, their authorized agent or attorney, or to the Clerk and Master of said court, the amount decreed in their favor, with interest and costs; and on this being done, a decree will be pronounced in said court, setting aside the Master's sale, and canceling or surrendering the notes of the purchaser. On the failure of defendants to make said payment, the Chancellor will pronounce such decree as he may deem proper. The costs of this cause, in this Court, will be paid by complainers.

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1. APPEAL. *From decree final as to one person.* An appeal may, in the discretion of the Chancellor, be allowed where the rights of one party are

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determined, though there are other parties as to whom the decree is not final.

2. SAME. *Leave to appeal.* Where an appeal lies in the discretion of the Chancellor, a grant of an appeal, without more, will be held to be in the exercise of the discretion.

FROM GREENE.

Appeal from the Chancery Court at Greeneville, H. C. SMITH, Ch., presiding.

The decree appealed from was one confirming a sale of land, and ordering "that when said purchase money shall be fully paid, the legal title shall vest" in the purchaser; and further ordering a writ of possession against the applicant, who was the grantor of the property, by deeds held void as to creditors.

F. G. REEVE, for the complainants, moved to dismiss the appeal.

JAS. G. DEADERICK, for appellant.

DEADERICK, J., having been of counsel, did not sit. J. T. SHIELDS, Sp. J., delivered the opinion of the Court.

In these cases, which were consolidated and heard together in the court below, the defendant, Farnsworth, prayed an appeal from the decree, pronounced on the 14th of May 1870, which was granted by the Chancellor. A motion is now made to dismiss the appeal, on the ground that the said decree was not final. It is true that this decree is, in some respects, interlocutory, and that questions as to some of the parties

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are reserved for further order; but as to the defendant, Farnsworth, it is in substance, a final disposition of the cause, because it adjudicates conclusively all the questions in which he has an interest. But, notwithstanding this, he could not appeal from the decree, as a matter of course and of right, until a final adjudication of the rights and equities of all the other parties. *Delap et al. v. Hunter et al.*, 1 Sneed, 101. The right to prosecute an appeal or writ of error depends upon the finality of the decree, and no appeal or writ of error lies from any interlocutory decree or order. This is the general rule. But to this general rule the Code, 3157, gives to the inferior courts the power, in their discretion, to make exceptions in certain specified cases, among which is where the decree settles the rights of one party, and not of all; in which case the Chancellor may, in his discretion, allow the party whose rights are settled to appeal. Such is clearly the present case. It is true, the entry of the prayer and grant of the appeal does not state that the appeal was granted in pursuance of this provision of the statute; but it does appear that the appeal was expressly granted; and when this Court can see, as we can in this case, from the record, that a proper state of facts existed for the exercise of the discretionary power so vested in the Chancellor, we will presume that the appeal was granted under and in pursuance of the statute.

The motion to dismiss is, therefore, disallowed.

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Z. L. BURSON v. J. H. DOSSER and G. W. TELFORD,
Executors of the will of EWING MCCLURE, dec'd.

1. BILL OF REVIEW. *Error apparent.* Error apparent in a decree is such error of law as appears, assuming the facts to be such as are stated in the decree, not errors of fact apparent from the proofs.
2. VENDOR'S LIEN. *Waiver by taking security.* Whether a vendor intends to waive his lien by taking personal security is a question of fact. The law presumes the waiver, but this may be rebutted by proof.
3. SAME. *Error in decision as to.* Error in deciding upon the fact of waiver is not error apparent on the face of a decree.
4. BILL OF REVIEW. *For error of fact. Leave.* It seems that the propriety of the leave granted to file a bill of review for errors of fact can only be tested here after a motion to dismiss in the court below, and by having made the evidence on which the leave is based, part of the record.
5. SAME. *New matter. How stated.* New matter must be so stated in a bill of review, so as to enable the court to determine upon demurrer, whether or not, when produced, it will be controlling in the cause, or be merely cumulative, not necessarily changing the result; and whether the party has been guilty of any negligence in failing to discover and produce it before.
6. SAME. *Cumulative Evidence.* Cumulative evidence, upon matters to which proof has been taken on the former trial, is not sufficient ground to sustain a bill of review.

FROM WASHINGTON.

Appeal from the Chancery Court at Jonesboro, S.
J. W. LUCKY, Ch.

R. M. BARTON, for complainant, on the effect of registering note, cited *Brogan v. Savage*, 5 Sneed, 689; *Galt v. Dibbrell*, 11 Yer., 147; *Montgomery v. Hobson*, Meigs, 448; *Harrison v. Wade*, 3 Cold., 505. Vendor's lien waived, *Marshall v. Christmas*, 3 Hum., 616; *Camp-*

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bell v. Baldwin, 2 Hum., 248. Vendor estopped, *Thompson v. Davidson*, 3 Head, 384. Motion to dismiss necessary, *Dance v. McGregor*, 5 Hum., 433. Demurrer is waived by answer. Code, 4318, 4319, 4321; *Kirkman & Ellis v. Snodgrass*, 3 Head, 370.

WM. H. MAXWELL, for defendants, insisted that error of fact was not matter for bill of review, citing *Eaton v. Dickinson*, 3 Sneed, 400.

Burden of proof on vendee to show waiver by taking security, 2 Sto. Eq., § 1226. Notice of lien, *King v. Travis*, 4 Hay, 280, 285; *Taylor v. Hunter and Searcy*, 5 Hum., 569, 570.

Bill of review, Bacon's Ordinance quoted 1 Meigs Dig., p. 273; Rules of Pr., No. 32; Act of 1835, c. 20, §§ 15, 16; Code, 3121; *Bledsoe v. Carr*, 10 Yer, 56-7; *Eaton v. Dickinson*, 3 Sneed, 397. Cumulative proof, *Frazier v. Syfert*, 5 Sneed, 100, 104.

Diligence, *Young v. Forgey & Henderson*, 4 Hay, 189, 190.

R. MCFARLAND, Sp. J., delivered the opinion of the Court.

This is a bill of review. The original bill was filed by Ewing McClure, in his life-time, against Burson, Henry R. Lutz, A. A. Broyles, Osceola Sitgreaves and John Andes. The object of the bill was to assert a vendor's lien upon a tract of land for unpaid purchase money, upon the following state of facts: About the year 1858 or 1859, said McClure sold the land in question to Henry R. Lutz, upon a credit extending for several years, and gave to said Lutz an ordinary title bond,

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retaining in himself the legal title, as security for the purchase money.

Lutz having paid part of the purchase money, sold part of the land to Adam Andes and one Holms, and McClure executed a deed for this part of the land, and as to this, there is no controversy. On the 2d of August, 1861, Lutz sold the balance of the land to John Andes, and McClure made to Andes a deed for the same, and took from him a new note for the unpaid purchase money, which note was executed also by Lutz. It is clearly shown, that in this transaction, it was the intention of the parties, that McClure's lien for the payment of this note, should remain upon the land. He caused the note to be registered, assuming, that, as the note upon its face, showed it to be for the purchase money for the land, that this would constitute notice of the lien to third parties. On the 2d of May, 1863, McClure accepted another new note in the place of the one last mentioned, executed by A. A. Broyles, O. Sitgreaves and John Andes.

Andes had loaned to Broyles & Sitgreaves, a sum of money, for which they, at his instance, executed this note, directly to McClure. On the 8th of July, 1863, Andes conveyed the land to Burson.

After McClure had accepted the note of the 2d May, 1863, but whether before or after the date of Burson's deed, does not appear, McClure, at the instance, and in the presence of Burson, wrote, or had written across the face of the note on the Register's books, "satisfied," and signed his name thereto. It was conceded that Burson, before he bought or paid

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for the land, had notice of the unpaid purchase money, to McClure, and also that he knew that the note upon the Register's books was satisfied, by the execution of the note of the 2d May, 1863. And the question raised by the pleadings in the cause, was, whether or not McClure waived or abandoned his lien upon the land, by accepting the new note of the 2d May, 1863, or marking the previous note on the Register's books "satisfied" in the presence of Burson. Upon this issue, the testimony of two witnesses was taken. Upon the part of McClure, Elbert Taylor proved that he was the register, and was in his office when McClure and Burson came in to have the note on the books marked satisfied. At first McClure refused to sign this on the record, and they both went out, but afterwards came back. McClure refused to sign the record, because he was afraid he would thereby lose his lien upon the land. Burson told him that the new note, (the note of 2nd of May, 1863,) would hold his lien upon the land.

McClure asked witness's opinion, and witness thought as Burson did; and upon this, witness wrote the word "satisfied," and McClure signed his name on the books. Burson was very anxious, and McClure reluctant, to make this transaction. For Burson, A. A. Broyles proved that Andes loaned the firm of Broyles & Sitgreaves \$1,830, for which they, with Andes, executed to McClure the note of 2nd of May, 1863, in the place of the one McClure then held upon Andes for the balance of the land. His understanding was, that McClure, on receiving this note, was to release his lien upon the land, so as to enable Andes to sell it; but he got this under-

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standing from Andes. This was, in substance, the entire case.

McClure died pending the suit, and the same was revived in the name of his personal representatives, and on the 27th of November, 1867, a final decree was rendered in their favor, declaring their lien upon the land. Hereupon this bill of review was filed, to review said decree, both for errors apparent upon the face of the decree, and also for newly discovered matter. The errors which this bill charges as apparent on the decree, are:

1. That the decree erroneously assumes that, by the registration of the note of the 2nd of August, 1861, McClure had a valid lien upon the land, when such was not its effect; and because it is apparent that, by accepting the new note of the 2nd of May, 1863, and marking the former one satisfied, McClure's lien was lost, and that the Court, in refusing to so hold, committed an error of law, and this error "is error apparent." The executors of McClure answered, insisting upon matters of demurrer. The action of the Court upon a demurrer to a bill of review, *for errors apparent upon the face of the record*, necessarily disposes of the whole case. Whether or not the error appears must be determined from the bill and the original record, and cannot be changed by an answer to the bill of review, or proof. We think it clear that this is not a case of error apparent upon the face of the record. It has been held by this Court, that, for the purpose of ascertaining whether or not error of this character exists, the pleadings and decree may be looked to, but not the proof at large. *Eaton v. Dickinson*, 3 Sneed, 397.

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But even if we look to the proof, the error is not apparent. By "error apparent" is not meant that the decree is merely erroneous and improper, because based upon erroneous conclusions of fact, drawn from the evidence, but a decree that is erroneous in point of law upon the facts assumed. In the language of Lord Eldon, "there is a distinction between 'error in the decree and 'error apparent.'" Error apparent does not apply to a merely erroneous judgment. "The question," he says, "is not whether the cause is well decided, but whether the decree is right or wrong upon the face of it;" and gives, as an instance, "an infant not having a day in court to show cause," *etc.* 3 Daniel's Ch. Pr., 1728.

As we have seen, the question in the original cause was, whether or not McClure held a lien upon the land for unpaid purchase money, or whether, by the act of accepting the new note of the 2nd of May, 1863, and marking the former one satisfied, he waived or abandoned this lien. Whether or not a vendor who sells and conveys his land, intends to waive his lien by taking personal security, is a question of fact, upon which evidence may be heard. Ordinarily, the law presumes that the lien is retained; but when personal security is taken, the rule is changed, and the law presumes that the vendor intended to waive his lien and rely upon his personal security. But this presumption may be rebutted by proof, showing that such was not the object and intention of the parties. *Campbell v. Baldwin*, 2 Hum., 248; *Marshall v. Christmas*, 3 Hum., 616; 2 Head, 128; 3 Head, 384.

It was not assumed as a matter of law, by the decree

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in question, that the lien of the complainant, McClure, existed by mere force of his note upon the register's book. It is clear that causing the note to be registered could not give it the effect intended. The facts can only be looked to as evidence of the intention of the parties. The question before the Court was one of fact, to be determined upon the evidence, upon which the Court was of opinion that the lien of McClure was retained upon the land for the balance of purchase money due, and that this lien was not waived by accepting the note of the 2nd of May, 1863, or marking the former note satisfied. Nor was Burson induced to believe that the lien was thus waived.

If the Chancellor erred in this, the error consisted in drawing erroneous conclusions of fact from the evidence and circumstances in the record. An error of this character, if one existed, is not "error apparent" upon the face of the record, for which a bill of review will lie. And besides, we should have arrived at the same conclusions the Chancellor did.

This bill is also filed upon the ground of newly-discovered matter, and leave of Court to file the bill upon this ground was obtained. The question whether the Court acted properly in granting this leave, is probably not before us, for the reason that no motion was made to dismiss; and the affidavits upon which the leave was granted, if any were made, are not made part of the record. The allegation of new matter in the bill is this: "The facts which your orator believes he can certainly establish by credible and reliable testimony, are, that before your orator had taken a deed for the land, but after he had

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contracted verbally with said Andes for the purchase thereof, the said McClure, learning that said Andes was about to convey said land to your orator, and your orator learning that said McClure was the vendor originally to said Andes, distinctly agreed with and informed your orator that the purchase money for said land, sold and conveyed to said Andes, and by him to your orator, was satisfied, and that said land was free from incumbrance; and upon this assurance, your orator completed the purchase, and paid in full for the land. This newly-discovered testimony could not have been produced upon the hearing in the original cause, because it was not then known to your orator that these facts were known to the witness by whom he is now able to prove them." To this the defendants insist upon a demurrer, upon the ground that the newly-discovered testimony is not stated with sufficient particularity, and that the names of the witnesses by whom the facts can be proved should have been given. It seems well settled that the affidavits upon which leave is asked to file a bill of review of this character, should state with *particularity* the newly-discovered testimony. How the new matter should be stated *in the bill* seems not to be so well settled.

We are of opinion that the "new matter" should be so stated as to enable the Court to determine upon a demurrer, whether or not the newly-discovered testimony, when produced, will be of such a character as will make it controlling in the cause, or whether it will be merely cumulative, and such as will not necessarily change the result, and so that the Court may

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also determine whether, from the nature of the new matter, the party has been guilty of any negligence in not discovering and producing the evidence upon the first trial. In *Livingston v. Hubbs*, 3 J. C. R., Chancellor Kent thought that the new evidence must not be a mere accumulation of witnesses to the same fact, but some stringent written evidence or newly-discovered papers. Other authorities are to the same effect; and it is said that when testimony of witnesses is admitted to establish the new matter, it should be done with great caution, as tending to open the door to perjury. Story Eq. Pl., § 415, note 1. See, also, *Frazier v. Syfert*, 5 Sneed, 100.

Furthermore, where the new matter is, from its nature, such as that complainant, with proper diligence, might have had it upon a former trial, no relief will be granted upon it. *Young v. Forgey*, 4 Haywood, 189, 190. In that case, the principal witnesses by whom the complainant proposed to establish the new matter, were his neighbors and one, his brother. The Court held that this showed such negligence upon his part, as that he was not entitled to the benefit of the evidence upon a bill of review. The allegation of newly-discovered testimony in this cause amounts to no more than an averment, that he can establish that McClure had admitted to him that his purchase money was satisfied, and that he distinctly waived his lien upon the land for unpaid purchase money. This, as we have seen, was the proposition controverted in the original cause. The bill does not state the nature of the newly-discovered testimony, by which this proposition is to be

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established, except that he can establish the first by credible and reliable witnesses. In other words, it is an averment that, upon another hearing, he can obtain other witnesses to testify in his behalf, upon the question controverted in the original cause, and upon which testimony was then taken. That this new testimony is merely cumulative is evident; and whether it would be sufficiently strong to change the result could not be determined from the bill, but only upon consideration of the additional testimony, when taken and considered with the other evidence in the original cause. If this be a good ground for a bill of review, there would probably be but few seriously contested cases where grounds equally strong might not be presented. Parties after a trial, and after discovering the ground upon which they failed, would too often discover that, upon another trial, they could maintain their side of the contest, with more evidence and greater skill. This would open the door to endless frauds and perjuries.

We think the demurrer should have been sustained and the bill dismissed. This is the more evident, when we consider the newly-discovered testimony which was taken in the cause. The principal witness, by whom complainant attempts to make out the newly discovered facts, is John Andes, from whom he bought the land, and who bought from McClure, and who, of all others, was cognizant of the facts, as the complainant must have well known; as he states in his answer to the original bill, that Andes procured McClure to release his lien. His failure to procure the testimony of Andes upon the former hearing, was such negligence as should not be excused. Without dis-

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cussing the testimony offered in support of the bill of review, it clearly appears to be of merely a cumulative character; and we are by no means satisfied, that, taken in connection with the evidence and facts in the original cause, it changes the result.

The Chancellor dismissed the bill, and we affirm his decree.

THOMAS H. CALLOWAY, in error, v. V. H. STURM.

1. OFFICE. *Incompatible. Acceptance of.* The acceptance of the office of Supreme Judge of Tennessee, by a member of Congress, vacates the seat in Congress. His being a member of Congress does not invalidate his right to the office of Judge.
2. OFFICE OF JUDGE. *Vacancy. Power of Governor to fill.* On the resignation of a Supreme Judge, under the Constitution of 1835, the Governor had no power to fill the vacancy, longer than until the office could be filled by election; and it was his duty to order the election to be held, after the two months, during which, notice was required by law to be given.
3. SAME. *Same. Under Schedule of 1865.* Section 7 of the Schedule to the Constitution of 1865, did not enlarge the authority of the Governor in this respect. The Governor, under it, had no authority to issue a commission to fill out an unexpired term.
4. SAME. *Same. Act in excess of power.* A Judge, under such a commission, might lawfully act until the vacancy was filled by election.
5. SAME. *De facto.* The acts of a Judge acting under a commission, are valid, as acts of an officer *de facto*, and this principle applies to proceedings *ex parte* and at Chambers.

Motion to dismiss writs of error.

L. A. GRATZ, for the motion.

GEO. BROWN, against it.

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NICHOLSON, C. J., delivered the opinion of the Court.

This is a motion to dismiss a writ of error and *supersedeas* granted by Horace Maynard, Judge, on the 18th of September, 1868. The motion is based upon the allegation that Mr. Maynard had no authority as a Judge of the Supreme Court, to grant the writ. It is said that he was a member of Congress at the time of his appointment by Gov. Brownlow, as a Supreme Judge, to fill out the unexpired term of Judge Milligan, who resigned the position; and that being a member of Congress, he was ineligible to the office of Supreme Judge; and for that reason his appointment was illegal and void. Assuming that we can judicially know that Mr. Maynard was a member of Congress at the time of his appointment as a Supreme Judge, it does not follow, that his appointment, for that reason, was illegal and void. It is true, as argued, that, by the Constitution of Tennessee, Art 6, s. 7, and the Code, 748, a member of Congress is disqualified for office under the State Government, and is guilty of a misdemeanor in holding any such office, but it does not follow, that, because Mr. Maynard, whilst a member of Congress, accepted a commission, and qualified as a Supreme Judge, his acceptance of that office was a nullity. The consequence was, if Gov. Brownlow had the authority to appoint him, that he thereby surrendered his right to a seat in Congress. It is settled, that, on the acceptance and qualification of a person to a second office, incompatible with the one he is

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then holding, the first office is *ipso facto*, vacated. It operates as an implied resignation—an absolute determination of the original office. *People v. Carrique*, 2 Hill, 93; *Rex v. Treleny*, 3 Bur., 1616; *Millward v. Thatcher*, 2 T. R., 87; 13 Petersdorff's Abr., 3.

It follows, that when Mr. Maynard was appointed as a Supreme Judge, he vacated his office as a member of Congress and became a Judge of the Supreme Court, provided Gov. Brownlow had any authority to make the appointment; nor does the fact that Mr. Maynard continued to serve out his time as a member of Congress, affect the question before us. That was a matter entirely for the adjudication of Congress.

This brings us to the investigation of the legality of Mr. Maynard's appointment as a Judge. The election of all officers and the filling of all vacancies that might happen by death, resignation, or removal, not otherwise directed and provided for by the Constitution of 1835, was directed therein to be made in such manner as the Legislature might provide. Art. 7, sec. 4. By section 312 of the Code, it was provided, that whenever a vacancy occurs in the office of Supreme Judge, it is made the duty of the Governor to order an election, by issuing proper writs of election; and by section 315 it was provided, that, in the meantime, the Governor should appoint a suitable person to fill the office until the election of a successor; and by section 313, two months' notice of the election was required to be given. It follows that, upon the resignation of Judge Milligan, the law required Gov. Brownlow to issue writs of election for his successor; and, until the two months'

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notice should expire, he could fill the office by a temporary appointment. He had no power under the Constitution or law, to appoint and commission Mr. Maynard to fill the unexpired term of Judge Milligan. All the power he legally had, was to appoint Mr. Maynard until Judge Milligan's successor was elected by the people; and the law made it his duty to have the vacancy filled by the people, after giving two months' notice. Nor was the power of Gov. Brownlow enlarged by section 7 of the Schedule to the amended Constitution of 1865. By that section it was provided, that officers already appointed, or who might thereafter be appointed, should continue to hold their offices until their successors should be elected or appointed and qualified as prescribed by the laws and Constitution. Upon the resignation of Judge Milligan, this clause in the Schedule conferred upon Gov. Brownlow no power to appoint his successor, otherwise than was provided for by law. It follows, that Gov. Brownlow had no authority to commission Mr. Maynard as a Supreme Judge, to fill out the unexpired term of Judge Milligan.

But it does not follow, that, because Mr. Maynard's commission as a Supreme Judge was illegally issued, authorizing him to hold until the expiration of Judge Milligan's term, therefore his acts as such Judge are void. Gov. Brownlow had authority to appoint and commission him until Judge Milligan's successor should be elected. If Gov. Brownlow had pursued the law and ordered an election, Mr. Maynard might very well have acted under the commission until the election of Judge Milligan's successor, at which time his commis-

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sion would have expired. And, on another ground Mr. Maynard's judicial acts under his commission, would be valid, although his appointment and commission may have been illegal and void. In that view, Mr. Maynard was a Supreme Judge *de facto*, and his competency as such could not be inquired into by the parties affected by his acts. This position is well established in many cases in this State. The case of *Blackburn v. The State*, 3 Head, 690, is directly in point. See also 5 Sneed, 514; 9 Hum., 163; 2 Cold., 605. The fact that the official act of Mr. Maynard complained of was an *ex parte* exercise of judicial functions, does not take the case out of the principle. It is well settled that the judgments and official acts of an officer *de facto*, are binding and valid; and the competency of the functionary, acting under commission, cannot be inquired into by parties affected by them. He may be removed from the office, and his powers terminated by the proper proceedings; but, until that is done, his acts are binding.

The motion to dismiss is therefore disallowed.

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JOSEPH A. MABRY v. GEORGE W. ROSS *et al.*

1. SUPERSEDEAS. *To interlocutory order.* The jurisdiction conferred on the Supreme Court, to supersede an interlocutory order, decree or execution, issued thereon, as in case of final decree, only applies to such orders as are to be executed by some affirmative action or process of the Court.
2. SAME. *Same. Order dissolving injunction.* An interlocutory order of a Court of Chancery, dissolving an injunction granted to prevent a defendant from taking a corporate office, is not such an order as it is within the power of the Supreme Court to supersede.

FROM KNOX.

Petition for a writ of *supersedeas*, to the Chancery Court at Knoxville, O. P. TEMPLE, Ch.

GEORGE BROWN, J. R. COCKE, and W. J. HICKS, for petitioner.

A. CALDWELL and J. M. THORNBURG, for respondents.

SNEED, J., delivered the opinion of the Court.

This is a petition presented to this Court by Joseph A. Mabry, complainant in the case of *Joseph A. Mabry v. George W. Ross, et al.*, now pending in the Chancery Court at Knoxville, praying for a writ of *supersedeas* to be issued from this Court, superseding an interlocutory order in said cause, dissolving an injunction granted upon the prayer of his said original bill.

The petition alleges that on the 1st day of October, 1870, the petitioner, as President and Receiver of the

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Knoxville and Kentucky Railroad Company, filed his original bill in the Chancery Court at Knoxville, against George W. Ross, C. M. McGhee, Perez Dickinson, John Fouche, H. S. Chamberlain and E. J. Sandford, of Knox county, and E. C. Edwards, a citizen of Anderson county, charging, among other things, that under the charter of said company and the amendments thereto, no person but a *bona fide* stockholder in his own right, of at least five shares of stock, can be a Director of said company, except State Directors, and persons appointed by a county or corporation owning stock in said company; that, in accordance with the charter and by-laws of said company, and at the annual meeting of the Directors thereof, on the — day of March, 1870, the petitioner was duly elected President of said company for the next twelve months then ensuing, which office he still holds, and claims the right to retain until the expiration of his said term; that in September, 1869, he was appointed Receiver of said railroad company, under the laws then in force, and gave bond, and was duly commissioned as such; and that under the present law he had been re-appointed and commissioned as said Receiver; and that, as such Receiver, the said corporation was largely indebted to him; that at a meeting of the company, on the 26th of September, 1870, the defendants were elected Directors thereof; and that said defendants, Geo. W. Ross and E. C. Edwards, not being the owners in their own right, of the requisite amount of stock, were elected in contravention of the laws governing said corporation, and that their election was void; that said defendants were about to hold a meeting for

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the purpose of electing another President, and thus jeopardize the interests of the road, and place its management in unauthorized hands; that such an election would bring a cloud upon complainant's right as President and Receiver, and if consummated would result in irreparable injury to the State, to the interests of the road, and to complainant.

The prayer of the said bill was, among other things, that, at the hearing of the cause, said defendants, Ross and Edwards should be enjoined from acting as Directors of said road, under said void election, and that their election be declared null and void; that the defendants be enjoined from proceeding to elect a President, until the expiration of the petitioner's said term of twelve months; and that they be enjoined from doing any act to disturb the complainant in the quiet enjoyment of his said office during his said term; that in the meantime, temporary injunction issue, restraining the defendants, as aforesaid, until the final hearing of the cause; that on the 1st of October, 1870, a preliminary fiat of injunction was granted by the Hon. E. T. HALL, Judge, &c., and, upon the execution of the required bonds, was issued and served; that on the 18th day of October, 1870, the defendants filed their joint answer to said bill, which answer was excepted to by complainant for insufficiency; and the said exceptions, four in number, were sustained by the Clerk and Master, and, on appeal to the Chancellor, three of said exceptions were sustained by him; that the defendants, thereupon, without having filed a sufficient answer, moved the Chancellor for a dissolution of said

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shall be granted or withheld." And he adds, "there is wisdom in this course, for it is impossible to foresee all the exigencies of society which may require their aid to protect rights or redress wrongs;" and hence he contends this jurisdiction should be fostered and upheld by a steady confidence. 2 Eq. Jur., 959.

The discretion of a Judge, it is true, is said to be the law of a tyrant—it is always unknown; it is different in different men; it is casual, and depends upon constitution, temper, taste and passion. Bouv. L. D., 428. And in reference to the discretion as to granting injunctions, it is said by Mr. Justice Baldwin, "there is no power the exercise of which is more delicate, which requires greater caution, deliberation and sound discretion, or is more dangerous in a doubtful case." 2 Story Eq. Jur., § 959.

But, delicate and dangerous as is this jurisdiction in a court of equity, and injurious as its exercise may sometimes be, can this Court, under the authority conferred by the statute, award the writ of supersedeas, to thwart and defeat an interlocutory order granting a temporary injunction? Why not? Because the injunction is not an active, but a passive, thing. It is of itself, a supersedeas. There is nothing *in fieri* to check or stop. The writ has its peculiar and appropriate office, and in such case, it would be powerless. And injurious and hurtful as the effect of such injunction may be, the parties must be left to litigate their rights to a final hearing, and to look to their remedies by appeal or writ of error.

This, then, is an application, not to supersede an injunction, but to supersede an interlocutory order by

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which an injunction is dissolved. In other words, it is an application to this Court to reinstate a temporary injunction, dissolved by an interlocutory decree. The granting or dissolving the injunction was matter of discretion, to be determined by the equities of the parties. By its dissolution, no act is commanded to be done; no execution, or other process, issues upon it. The parties are simply restored to their *status quo*, as they stood before the bill was filed.

The defendants in this case are required, upon the dissolution of the injunction, to execute a bond to indemnify the complainant against all loss and damage which may result from the wrongful dissolution thereof. He is, in any event, secured. The company for which he is receiver is secured. If he is unjustly deprived of his office, he can litigate his rights in another form of proceeding. If any affirmative action followed this interlocutory order to make it effective, there would be something upon which the writ of supersedeas could operate. If any execution issued upon it, then the writ would be appropriate. We can scarcely misapprehend the intention of our law-givers upon this subject, when we take all they have said together.

The section above cited, 3933, authorizes this Court, in term, or any Judge of it, in vacation, to grant writs of supersedeas to an interlocutory order or decree, or execution issued thereon, as in case of final decree; and may require the party applying to give bond, with good security, payable to the opposite party, conditioned to pay the amount of the interlocutory order or decree, if so required, upon final hearing. And, by section 4513, it

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is provided that they may grant a supersedeas to *the execution of an interlocutory decree* of an inferior court, in the cases provided for in section 3933. These two sections, when considered together, can mean nothing else than that the order to be superseded must be in execution, or involve some affirmative action. We are of opinion that this is not one of the cases contemplated by law, in which this Court can grant the writ prayed for.

The jurisdiction was exercised by this Court, under the peculiar facts of the case of *Williams v. Boughner*, 6 Cold., 486; but it nowhere appears in that case that any question was made on the interpretation of these statutes.

The question came before this Court again, in the case of the *McMinnville and Manchester Railroad Company and Marbury v. Huggins*, decided at the last term of this Court at Nashville, 7 Cold., 217. In that case it is held that this Court has not the jurisdiction, under the statutes, to set aside an interlocutory order granting a temporary injunction, or an order dissolving such an injunction. The reasoning of Mr. Justice Andrews in that case, is conclusive; and we may be permitted to commend it as the leading case upon the interpretation of these statutes.

The application for a supersedeas is disallowed, and the petition dismissed.

J. F. Gillespie *et al.* v. Wm. Goddard.

JAMES F. GILLESPIE and JAMES R. COX v. WILLIAM
GODDARD.

1. ERROR. *Filing Record. Duty of Circuit Court Clerk.* It is not the duty of the Clerk of the Circuit Court to file a transcript for writ of error in this Court.†
2. SAME. *Motion to dismiss. When to be made.* The motion to dismiss a writ of error must be made at the first term of the Court after the defendant in error has notice of the writ of error.

FROM BLOUNT.

Motion to dismiss writ of error.

JOHN BAXTER, for the motion.

GEORGE ANDREWS, MCGINLEY and HOOD, for plaintiffs in error, cited *Bell v. Brown*, 5 Yer., 107; *Nance v. Hicks*, 1 Head, 624; *Nicks v. Johnson*, 3 Sneed, 326; Code, 4041, 2863, 2864, 2866, 2867.

NICHOLSON, C. J., delivered the opinion of the Court.

This cause was tried on the 27th of May, 1867, when judgment was rendered. No appeal was prayed for or granted, though a bill of exceptions was signed, sealed and made a part of the record. In October, 1867, the plaintiffs in error executed a bond before the Circuit Court Clerk, to defendant in error, in the penalty of

†See *Tedder v. Odum*, Nash., Dec. 12, 1870.

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\$250, conditioned that plaintiff in error would "prosecute with effect an appeal from the Circuit Court of Blount county to the Supreme Court, &c." On the back of the bond is a certificate of the Circuit Court Clerk that the securities to the bond are good and solvent men.

A transcript of the record was made out by the Circuit Court Clerk on the 23d of May, 1868, but was not filed with the Clerk of the Supreme Court until the 12th day of February, 1869. Defendant in error, upon these facts, moves to dismiss the appeal. It is clear that the cause is not in this Court by appeal or appeal in error, and if we can retain it at all it must be on the ground that it is here by writ of error. The judgment was rendered on the 27th of May, 1867, and the transcript was not filed with the Clerk of this Court until the 12th of February, 1869, not within twelve months. Nor was any bond executed to the Clerk of this Court for writ of error when the transcript was filed. But it is probable the record was filed for writ of error, and that the bond taken by the Circuit Court Clerk was deemed sufficient. We should hold that the defective bond might now be remedied, if the record had been filed in time for writ of error.

It is said that plaintiffs in error ought not to be prejudiced by the failure of the Circuit Court Clerk to file the transcript in time. But it was not the duty of the Clerk to do so. He did all he was required to do in making out the transcript. He made it out on the 23d of May, 1868, in time to be filed within the twelve months. It was the business of the plaintiffs in error

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to file the transcript. This they did not do until the 12th of February, 1869. It was their negligence, and not that of the Clerk. It is next said that defendant in error has waived his right to avail himself of the motion, at the present term of the Court, because he slept upon his rights during the last term, and until the time has elapsed within which a writ of error can be prosecuted. There would be force in this suggestion, if it appeared that plaintiffs in error had given notice to defendant in error that they had filed the record here for writ of error. As far as we can see, this requisition of the statute was not complied with; and so far as this Court can know, the defendant in error had no knowledge that the case was in this Court, until the present term, when the motion to dismiss was made. If plaintiffs in error had given the notice required by the statute, we should consider it the proper practice to hold that the defendant in error had waived any objection to the irregularities in bringing the case into Court, if he failed to take advantage of these at the first term. But in this case, the plaintiffs in error having failed to give the required notice, we can not presume that the defendant in error had any knowledge that the case was in this Court, until the present term.

Upon the whole, we find no ground upon which we can retain the case in this Court, and accordingly allow the motion to dismiss.

G. W. Churchwell v. Bank of East Tennessee.

GEORGE W. CHURCHWELL, in Error, v. BANK OF EAST
TENNESSEE.

1. PRACTICE IN SUPREME COURT. *Revivor*. September 19th, 1865, death of plaintiff in error, in a law cause pending by appeal in error, suggested in this Court, and admitted. October 1st, 1867, counsel for plaintiff in error moved to abate the suit, and of the defendant in error, to abate the appeal. October 16, 1867, counsel for plaintiff in error moved to revive. *Revivor* allowed.
2. SAME. *Same*. *Revivor* is allowed when the application is made at any time during the second term after the suggestion of the death, and, it seems, at any time after the second term, if made before the abatement is entered.

FROM KNOX.

In the Circuit Court, E. T. HALL, J., presiding.

DEADERICK, J., having been one of the counsel, did not sit in this case.

CROZIER, DEADERICK and CORNICK, for defendants in error, insisted upon the abatement of the appeal in error, citing *Young v. Officer*, 7 Yerg., 139; 10 Hum., 474; *Sappington v. Phillips*, 1 Yerg., 108; that after motion to abate writ of error, it was too late to revive, 3 Hum., 396; 6 Hum., 96; that abating the appeal will leave judgment in force, 10 Hum., 322; 2 Sneed, 3; 3 Sneed, 210; 1 Head, 541.

JAMES R. COCKE, for plaintiff in error, resisted the motion to abate, and insisted upon the revivor, and cited *Young v. Officer*, 7 Yerg., 139.

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J. T. SHIELDS, Sp. J., delivered the opinion of the Court.

At the February Term, 1861, of the Circuit Court of Knox county, the Bank of East Tennessee obtained a judgment against George W. Churchwell, from which he prosecuted an appeal, in the nature of a writ of error, to this Court.

On September 19, 1865, the death of said Churchwell was suggested, and admitted in this Court.

On October 1, 1867, the defendant in error entered a motion to abate the appeal in error.

On October 16, 1867, the plaintiff in error entered a motion to revive.

Both of these motions stand upon the record undisposed of, the judgment of the Court upon them never having been invoked.

It is provided by the Code, that suits commenced, with a single exception, shall not abate or discontinue for the death of either party, until the second term after the death has been suggested and admitted or proved, and entry to that effect made of record; and that no appeal or writ of error, in any cause or court, shall abate by the death of either plaintiff or defendant, but may be revived by or against his heir, personal representative, or assigns, under the rules prescribed for the revival of suits. Code, 2846, 2848 and 2854.

For the defendant in error, it is now insisted, that, as the motion to abate the appeal in error was first entered, that that motion should be allowed by the Court, and the appeal in error discontinued—the legal conse-

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quence of which would be to restore to full force and effect the judgment of the Court below, as an appeal in the nature of a writ of error does not, like a simple appeal, vacate the judgment, but suspends it only.

On the other hand, it is insisted that the motion to revive the appeal in error, made at the second term after the death was suggested and admitted, was in time, and should be allowed, although a motion to abate was, on a previous day, at this same term, made and entered.

We hold that, under a proper construction of the several sections in the Code upon this subject, that the right to revive a suit or an appeal or appeal in error, subsists and continues through the whole of the second term of the Court after the suggestion and proof or admission of the death. It is the clear meaning and intent of the statute, that the cause, or appeal, or writ of error, may be revived at any time during such term, and no previous motion entered to discontinue, can affect or defeat the right.

It has been held by this Court, under the provisions of the Act of 1785, ch. 2, s. 2; which does not, like the Code, fix a time within which no discontinuance shall be entered, though it was the practice of the courts to allow the abatement to be entered at the second term, on the motion of the surviving party; that the representative had the right to revive and prosecute the suit *at any time* before it was *actually abated* by order of the Court. 1 Meigs' Dig., 2. We would be inclined to give the same construction to the provision in the Code; but it is unnecessary for us to now decide

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that question, and we do not; for, in this case before us, no order to abate has been entered, a motion only having been made.

The motion to revive the appeal in error in this cause was entered in time to save the right; and we order that the motion to abate be discharged, and that the motion of the plaintiff in error be allowed.

HORACE FOSTER v. HENRY BUREM, and HENRY BUREM
v. HORACE FOSTER.

1. SUPREME COURT. *Power to adopt Rules.* The Supreme Court has power to establish such rules, to define and regulate the revivor of causes, as may adapt its proceedings to the present state of the law regulating the inferior Courts.
2. SAME. *Revivor. By bill or scire facias.* A cause may be revived against non-residents by bill of revivor and publication, or by *scire facias* and publication.

FROM HAWKINS.

In the Circuit Court, E. E. GILLENWATERS, J.,
presiding.

GEORGE ANDREWS, for Foster, entered the motion to revive, and have an order of publication as to non-resident parties. JOHN BAXTER, with him.

R. M. BARTON, WASHBURNE & PROSSER, for Burem.

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NELSON, J., having been of counsel, did not sit in this case. JAMES T. SHIELDS, S. J., delivered the opinion of the Court.

In these causes a death is suggested and proved. The parties against whom it is sought to revive are non-residents, and beyond the reach of the process of the Court. It is, therefore, manifest that the parties cannot be brought before the Court by the process of *scire facias*, and some other mode must be used.

This Court clearly has the power to adopt and use the necessary means for the exercise of its appellate jurisdiction, else in many cases it must entirely fail. It must have the power to remedy such imperfections as occur after its jurisdiction has attached. If, by reason of some event subsequent to the appeal, there is no person before the Court by or against whom it can be prosecuted—as upon the death of a litigant whose interest or liability does not either determine on death, or survive to some other litigant—the Court has the inherent power to cure the defect; and under the provision in the Code, 4504, authorizing the Court to establish its own rules of practice, we think the Court has the power to make and establish a rule, when a case arises to which there is no rule now in use that applies.

Before the statutory mode of reviving causes in the Court of Chancery by *scire facias* came in use, the remedy was by bill of revivor, or in the nature of a bill of revivor; and we can see no reason why such a bill cannot be filed in this Court, when, by reason of the parties being non-residents, the writ of *scire facias* cannot be served. The

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statute authorizing publication in lieu of personal service of process, in certain specified cases, we think is applicable to bills of revivor, and the difficulty of non-residence may be thereby obviated. Such appears to be the practice in the courts of New York, where the parties against whom a revivor is necessary, reside beyond the reach of the process of this court. The mode of reviving a cause in the Supreme Court of the United States, Rule xxviii, is by motion, order, and publication of the order.

The opinion of the Court is, that these modes of revivor may be adopted at the election of the party. If the bill of revivor be resorted to, it need state only the matters required by statute to be stated in the *scire facias*, when that remedy is used. If the remedy by motion and order be adopted, the order must show the style of the cause; the court from which the appeal is prosecuted; that the death of the party has been suggested and proved, or admitted; the name or names of the parties against whom the revivor is sought; and that they are non-residents; and that publication is ordered by the Court, in lieu of personal service of process. A copy of this order must be made out and certified by the Clerk, and inserted in some newspaper published in the division, for four successive weeks before the term at which the revivor is to be made.

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The Court, on a subsequent day, adopted the following additional

RULES OF PRACTICE.

In case of the death or marriage of any party to a cause or proceeding pending in this Court, making a revivor necessary, and no motion being made to revive by the party entitled to revive by motion, as now provided by law, the cause may be revived by *scire facias*, by bill of revivor, in cases in Chancery, or by publication as hereinafter provided.

If it shall appear by the return of the Sheriff upon the *scire facias*, or upon the subpoena, under a bill of revivor, that any defendant therein is not to be found, or if it be shown by affidavit filed, that any of the causes exist, which are specified in the 1st, 2d, 4th and 5th sub-divisions of section 4352 of the Code, as ground for dispensing with personal service of process, the Court in term time, or the Clerk, in vacation, may make an order requiring such party to appear at a time specified, and show cause why the suit should not be revived against him, a copy of which order shall be published for four successive weeks in some newspaper published at the place where the order is made, or in such other paper as the Court may order.

Writs of *scire facias*, subpoenas upon bills of review and orders of publication, if issued or made in term time, may be made returnable as the Court or Clerk may direct. If issued or made in vacation, such writs or orders of publication may be made returnable to the first day of the next term, or to any rule day

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in vacation; and in the latter case, after due publication or service of the writ, if no defense is made or cause shown against the revivor, the Clerk may, at any rule day in vacation succeeding such return day, enter an order reviving the cause.

The first Monday of every month shall be a rule day, and the Clerk shall keep a rule docket in which he shall enter all orders made by him under these rules.

November, 1870.

W. G. NEWMAN, Surviving Partner, &c., v. THE JUSTICES OF SCOTT COUNTY.

1. SUPREME COURT. *Final process.* The Supreme Court has jurisdiction to make any inquiry incident to its final process in causes determined in it.
2. SAME. *Same. Mandamus to County.* A mandamus, in the nature of an execution, to compel the Justices of a county to levy a tax to satisfy a judgment recovered in this Court against the county, being moved for, and affidavits being filed that nothing was due, the Clerk was ordered to report whether anything, and how much, remained due.

FROM SCOTT.

W. P. WASHBURN, for the plaintiff.

GEO. ANDREWS & L. C. HOUK, for the defendants.

NICHOLSON, C. J., delivered the opinion of the Court.

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At the last term of this Court, an *alias* peremptory mandamus was ordered to issue to the Justices of the County Court of Scott county, requiring them to levy and collect a tax for the purpose of satisfying a judgment recovered against them by the plaintiff, for the sum of \$3,100. The writ, for some reason not explained, was not issued in pursuance to the order of the Court. A motion is now made, asking the Court to revive the order made at the last term, and that an *alias* peremptory mandamus be now ordered. The motion is based upon an affidavit of the plaintiff, in which he states that in 1859 the defendants paid the sum of \$1,866 on the claim for \$3,100—leaving, including interest, the sum of \$2,225, due and unpaid—and he asks the Court for the mandamus, to have this amount levied and collected by defendants.

Defendants appear and resist the motion, and produce several receipts of plaintiff's attorneys, and an affidavit of the loss of another receipt of plaintiff's attorneys, for payments made in 1860 on said claim of \$3,100, amounting to about \$1,866; and insisting that these payments, added to the payments admitted in the affidavit of plaintiff to have been made in 1859, show that the entire claim of \$3,100 has been paid, and that, therefore, the motion of plaintiff ought not to be allowed.

Plaintiff's attorney suggests that the receipts relied on by defendants are the same admitted by plaintiff in his affidavit, and that in his affidavit he was inadvertently giving the year 1859, instead of 1860, as the date of the payments, and, therefore, he insists that \$2,223 is still due. It thus appears that an issue of fact as to the

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amount of the payments made, and the time when made, is presented for our determination, which issue, as the facts are now presented, we are unable to determine. Plaintiff is entitled to have an *alias* mandamus as a matter of right, unless this Court has the power to determine the fact as to the alleged payments, and shall find the facts in favor of defendants.

It is suggested for our consideration, whether, as our jurisdiction is only appellate, we can legally inquire into and determine the issue of fact presented. For wise reasons, the Constitution of the State has provided that the jurisdiction of this Court shall be appellate only, under such restrictions and regulations as may, from time to time, be prescribed by law. The Legislature has enacted no law expressly prescribing restrictions or regulations, governing the exercise of our jurisdiction, in such a case as is now presented.

It was in the proper exercise of its appellate jurisdiction, that this Court determined that plaintiff was entitled to the writ of peremptory mandamus. It was the judgment of this Court, upon an appeal from the Circuit Court of Scott county, that plaintiff was entitled to the enforcement of his claim by the process of mandamus. The enforcement of this writ is clearly within the power of the Court. Our power to order the issuance of an *alias* writ, upon satisfactory evidence that the former writ has not been executed, is unquestioned. If we have the power, then, it seems to follow, as a necessary consequence, that we have the power, when application is made for an *alias* writ, to inquire whether the former writ has been executed or not. If we had good reason

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to believe that the former writ had been executed, and the claim satisfied, we might do irreparable wrong and injury by ordering an *alias*, in the face of facts tending to show that no debt is really due from the defendants. We do not mean to be understood as indicating any impression as to the alleged payments in the present case. We are assuming a state of facts, simply by way of ascertaining our powers in the matter before us. If we should order an *alias* mandamus, under the circumstances of this case, it is by no means certain that any judicial tribunal could give the defendant relief, even if they should be able clearly to prove that the whole debt, or any part of it, has been paid.

Whilst we concede that our jurisdiction cannot be rested upon such considerations of injury or inconvenience, we see, in these considerations, strong reasons for acting with cautious deliberation in a matter of so much consequence, that we may do no injustice to either party. It is well settled, that, in the exercise of the acknowledged jurisdiction of this Court, we have the right to adopt all the rules and orders necessary and proper for carrying out and enforcing our judgments. This power is necessarily inherent in the Court, and without it the Court could not exercise and enforce, effectually, its legitimate jurisdiction. Of course, this power could not be legally exercised in contravention of any constitutional provision, or of any legislative act for the restriction or regulation of our appellate jurisdiction. It is provided by the Code, 4503, that the Supreme Court may issue all writs and process necessary for the exercise and enforcement of its jurisdiction; and, by section 4504, it may

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make rules of practice for the better disposal of business before it; and, by section 4500, the Court may order a jury to be summoned forthwith, to determine an issue of fact upon the return of a *scire facias* issuing out of said court. Judgment, on motion, may be rendered in this court against Sheriffs, for failure of duty as to the return of process issuing from the Court. And it has been held by this Court, that, if a judgment by motion be taken here against a Sheriff, for failure to make return of an execution, and the judgment is taken without notice, a Chancery Court may enjoin such judgment, if it is made to appear that the money on the execution had been paid over before the judgment was rendered. *Smith v. Vanhebbert*, 1 Swan, 110.

But suppose, in that case, the Sheriff had appeared and resisted the motion, on the ground that he had paid over the money, is it a matter to be doubted, that the Court would have power to determine the issue of fact as to the judgment? We think it clear, that, in a case like that, and in all cases where it becomes necessary, in the exercise of its jurisdiction, to the proper enforcement of the orders, judgments or decrees of the Court, that facts should be ascertained, the Court has the power, as a necessary incident to its organization as a court, and under the provisions of the Code, as to the enforcement of its judgments and the adoption of rules of practice, to have such facts ascertained, either by ordering a jury to be summoned, or by referring the matter to its Clerk for taking proof and making a report, as the circumstances of each case may indicate.

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Being satisfied that we have the power, and that the motion now before us can not be properly determined without an ascertainment of the fact, whether any, and if any, how much, has been paid on the claim of plaintiff, we refer the matter to the Clerk of this Court, with directions to take proof, and report as to the alleged payments, and that he make his report to the present term, if practicable; if not, to the next term, until the coming in of which report the motion is continued.

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15. *Amendment.* An amendment changing the form of action from trespass on the case to trespass, is to be applied to the process in which trespass on the case is the form, there being one in which that was the form of action, and an attachment in which it was not. *Ib.*
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20. *Ancillary. Sale of land under.* A sale of land under a judgment based upon summons and ancillary attachment, which does not state the amount of plaintiff's claim, or of his suit, without service or appearance, upon a publication which did not mention as defendant the owner of the land, held void. *Ogg v. Leinart*, 40.
21. *Of equity. Parties.* An equitable title is subject to attachment, but to reach it, the bill must seek to attach it as an equity, state the nature of the title, and make the holder of the legal title a party. Code, 2084, 3500. *Lane v. Marshall*, 30.
22. *Prima facie on legal estate.* An attachment upon land, as the property of the defendant, will be intended to attach a legal interest, and if he has only an equity, a sale under it will convey no title. *Ib.*
23. *Lien. Subrogation.* A purchaser, under a decree obtained without appearance of the defendant on such a bill, who has paid off a vendor's lien, will be subrogated to the vendor's right. *Ib.*
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in an attachment bill made the debtor firm defendants, by the individual names of the partners, and also made several creditors defendants by their firm names, with a view to give them an interest in the fund attached, it was held not to be material, they not being necessary parties. *Ib.*

28. *Bond. Defect. Amendment.* An attachment bond being signed in the firm name of complainants, if defective, would be cured by the execution of a new bond, and the lien is not postponed to the date of the new bond. Code, 3471, 3477. *Ib.*
29. *Bond of firm.* But such bond, by the Code, 1804, is good. *Ib.*
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3. *Lien for fees. On property in litigation. Petition to declare lien.* Attorneys, solicitors and counsel have a lien upon property recovered or protected by their services, which may be declared, by order in the cause in which the services are rendered. *Hunt v. McClanahan*, 503.
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1. *Precedents in time of civil commotion.* Judgments of courts in times of great civil commotion, are of but little authority. *Sherfy v. Argenbright*, 128.
2. *When United States decisions controlling.* Where a question of general rather than local interest, affecting many States, has been the subject of conflicting decisions, though properly governed by the same principles, the judgments of the Supreme Court of the United States upon it are of high authority, and ought, in general, to be accepted and adopted by the States. *Ib.*

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1. *Against two, on submission by one.* An award is not by the fact that it is made against two, one of whom is not a party, void as to the other, who has property submitted to the arbitration. *Mathews v. Mathews*, 669.
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BELLIGERENT RIGHTS.

1. *Confederate States.* During the war the Confederate States were entitled to the same belligerent rights as were the United States. Their armies, officers and soldiers, incurred no civil responsibility by encamping upon the lands of individuals, and using such timber and other property as was necessary to an army in camp. Their military commanders were the proper and only judges of this necessity; and what it was lawful for them to do, it was lawful for a citizen to advise. *Smith v. Brazelton*, 44.
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4. *Justification.* In an action of trespass, a plea, which attempts to justify an act under the belligerent powers of the Confederate State, is defective if it fails to show the defendant was a soldier. That he was "liable to perform military duty" is not sufficient. *Bayless v. Estes*, 78.
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4. *Exhibit lost. Remand to supply.* Where a paper, the loss of which can be supplied in the inferior court, under the Code, is shown by the bill of exceptions to be lost, the cause may be remanded to supply the loss. *Mynatt v. Hubbs*, 323.
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2. *Freighter. Concealment by.* A person omitting, without fraud, to state the character and contents of packages, fully, may be precluded from recovering the value of the articles so omitted; but his right to recover for articles enumerated will not be affected, *Ib.*

3. *Want of transportation.* Want of means of transportation to carry articles received for transportation, is no defense to a suit for failure or delay to carry them. It is questionable whether this liability can be limited by contract. *Ib.*

4. *Public enemy. United States was.* In the late civil war, the troops of the United States were a "public enemy," against whose act a common carrier within the Confederate lines, did not insure. *Ib.*

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CERTIORARI.

1. *Excuse for delay.* A statement in a petition for *certiorari*, that the execution gave to the defendant "the first reliable knowledge" of the judgment, is equivocal, and is not sufficient to excuse delay in applying for a *certiorari*. *Gillam v. Looney*, 319.
2. *Excuse for not appealing.* So, it is not a sufficient excuse for not appealing, that the defendant had the same question pending in the

CERTIORARI—*Continued.*

Circuit Court, and understood that the Justice would postpone the judgment until that was decided, the *certiorari* being applied for two years after judgment, and several months after the decision of the court case. *McDowell v. Keller*, 449.

3. So, that petitioner "has no recollection of ever having been notified of the trial or judgment, although the warrant appears to have been returned executed;" that he "was taken completely by surprise when the execution issued; and that "he would have seen to his interest long since, but for his want of knowledge of the existence of said liability," and praying relief, "as he never was cited to trial, as he now best recollects," the application being made more than five years after judgment; and it being admitted in the Court below that the return of service was made, and was true; this was held to be no sufficient cause for not appealing. *Smith v. Brown*, 320.
4. *Fiat*. A *certiorari* issued without a *fiat* is subject to be dismissed. *McDowell v. Keller*, 449.
5. *Motion to dismiss*. A party is not bound to move to dismiss a petition for *certiorari*, until the first term after he is served with process; and the service within five days before the term, will leave him at liberty to make the motion at the next term. *Ib.*
6. *Same*. Where appearance is the only evidence of service, the motion may be made at the term at which the party appears. *Ib.*
7. In Supreme Court. See SUPREME COURT.

CHALLENGE.

See JUROR.

CHAMPERTY.

1. Assignment of a bid at Chancery sale, after sale set aside and re-sale made, is void for. *Newland v. Gaines*, 720.

CHANCERY JURISDICTION.

1. *Legal remedy embarrassed*. A note deposited as security, being delivered up and renewed by the payor delivering to the holder a new note payable to the owner, the new note was collected in Confederate money by the holder and delivered up, after the liability for which he held it had ceased. Held to be a proper case for equity jurisdiction. *Scruggs v. Luster*, 150.
2. *Remedy at law*. *Purchaser at Chancery sale*. If purchasers of personal property, attached and sold under a Chancery decree, in a case in which they were complainants, are sued at law by the defendant in that suit, for the value of the property, their defense at law is plain and unembarrassed, if their decree is valid, and they can not sustain a bill to enjoin the suit at law. *Huddleston v. Williams*, 579.

CHANCERY JURISDICTION—*Continued.*

3. *Same. Same. Clerk and Master.* A personal representative of a deceased Clerk and Master, sued at law for the sale of property by his intestate, under a decree, can not maintain a bill to enjoin the suit. *Ib.*
4. *Construction.* This Court is not disposed, by construction, to extend the equity jurisdiction of courts, other than Chancery Courts. *The State v. Alder*, 543. *Lane v. Marshall*, 30.
5. Remedy for duress, at law and in equity, is concurrent. *McLin & Robertson v. Marshall*, 678.
6. *Attachment for rent.* A court of equity has jurisdiction of an attachment to enforce a landlord's lien for rent. *Sharp v. Fields*, 571.
7. To set aside award for fraud or oppression. *Matthews v. Matthews*, 669.
8. *Judgment by motion. Affirmed on error. Bill to set up payments.* On a judgment against a purchaser at Chancery sale, without notice, the defendant prosecuted a writ of error, on which the judgment was affirmed. He then filed a bill to set up payments made before judgment. Held to be too late. *Palmer v. Malone*, 549.
9. To enjoin an execution from the County Court, issued on a void decree or judgment by motion against a purchaser at a sale. *Rucker v. Moore*, 726.
10. *Void judgment.* To enjoin a void judgment, and declare a sale under it void. *Ingle v. McCurry*, 26.
11. And it will do so at the suit of a creditor. *Lane v. Marshall*, 30. *Ogg v. Leinart*, 40.
12. *To vacate judgment at law. Complainant must do equity.* A judgment by motion, obtained in favor of one surety on a note against another surety as a principal, his character of surety not appearing on the note itself, is voidable, and may be enjoined in equity. But the complainant, in such case, will only be relieved on condition that he pay his moiety. *Oreed v. Scruggs*, 590.
13. Equitable estates must be attached in equity. *Lane v. Marshall*, 30
14. Bill for new trial. Excuse for not making defense. See NEW TRIAL. *Powell v. Cyfers*, 526.
15. *Mistake in deed.* A note given to A, secured in a deed of trust to B, by mistake, deed may be reformed. *Sporrer v. Eifler*, 633.
16. *Contract. Reformed on Answer.* Note for \$2,050 which may be discharged in current bank notes, reformed to read payable in current bank notes, on the admission in the answer that such was the contract. *Talley v. Courtney*, 715.
17. *Surety. Exoneration. Before judgment.* A surety may bring his

CHANCERY JURISDICTION—*Continued*

creditor and his principal before a court of equity to compel the payment of debts and to be exonerated and attack fraudulent deeds, before judgment. *Greene v. Starnes*, 582.

CHANCERY PLEADING.

1. *Year's support for widow.* *Objection to.* If a bill in equity be filed to secure a widow the articles exempt from execution, and to lay off her year's allowance, the objection to the jurisdiction is waived, unless taken *in limine*. *Vincent v. Vincent*, 333.
2. *Same. Dower.* So of a bill filed to bring into Chancery a litigation pending in a court of concurrent jurisdiction, as where a petition for dower is filed in the County Court, and order to lay off dower, and report of Commissioners made. *Ib.*
3. *Objection to jurisdiction.* Objection that the surety has no right to file a bill until judgment against him, if good, would be waived, unless insisted on by the plea, demurrer, or motion to dismiss. *Greene v. Starnes*, 582.
4. *Demurrer.* An objection to the jurisdiction of the Chancery Court must be taken by demurrer proper. It can not be done by demurrer in the answer. *Rankin v. Craft*, 711.
5. *Demurrer. Special.* That a case is properly one of legal cognizance must be specially stated, as a ground of demurrer to a bill. A general demurrer for want of equity admits the jurisdiction. *Chesney v. Rodgers*, 239.
6. *Bill to execute decree.* A bill to carry out the purposes of the original bill, on a decree obtained upon it, must be filed as an amended and supplemental bill. *Herd v. Bewley*, 524.
7. *Bill to attack or modify.* To attack decrees or modify their operation, or show errors in them, the proceeding can not be by original bill, where prosecuted by a party to the cause. It must be by rehearing, writ of error *coram nobis*, bill of review, appeal or writ of error. *Ib.*
8. *Consolidated causes.* Where causes are consolidated, the parties are subject to this rule. *Ib.*
9. *Bill construed.* A bill filed by the guardian to enjoin a suit at law on a note, insisting that it was executed by him as guardian, so his ward was liable upon it, and that from lapse of time, the presumption had arisen, that he, the ward, had paid it, negatives a payment either by the complainant or by the ward, the complainant having bound himself to pay it, but not alleging that he had done it, and the ward being under no obligation to pay it. *Carter v. Wolfe*, 694.
10. *Allegation. Of title.* A bill charging that the title of A, a former owner of land in fee simple, "has been vested in complainant by operation of law," sufficiently alleges that he has title. *Sharp v. Fields*, 571.

CHANCERY PLEADING—*Continued.*

11. *Same. Oftenancy.* A charge in the bill that defendants were occupying lands at the death of the tenant for life, and that complainant permitted them to remain after the death, and is entitled, as owner, to one-third of the crops as rent, is a sufficient charge of indebtedness to support an attachment for rent. *Ib.*
12. *Attachment bill. Answer in response, and avoidance.* An answer to a garnishment bill, stating, in response, that the respondent had executed to the debtor a note, still due; but in avoidance, that it was done with the understanding that he was to pay the money to a third person, without showing that he had paid to that person, or showing that the person held the note, or where it was, there being no proof as to the matters in avoidance, was held to charge the respondent as debtor of the person to whom he gave the note. *Wolfe v. Carwood*, 597.
13. *Answer.* In a bill filed, there were special interrogatories, whether anything was paid for goods; and if so, when, where, and in what manner? An answer, stating that the vendor was indebted to the vendee, on account of payments made on debts of a previous partnership; that the vendee agreed to receive the goods in payment. Held responsive to the interrogatories. *Walter v. McNabb*, 703.
14. Imperfect description of immaterial parties not fatal. *Brooks v. Hartman*, 36.

CHANCERY PRACTICE.

1. *Oath to bill. Publication. Guardian ad litem.* A bill to sell slaves, filed in the County Court, *not sworn to*, does not authorize the appointment of guardians *ad litem* for infants, nor publication as to non-residents. *Rucker v. Moore*, 726.
2. *Publication. Evidence to disprove.* There being a positive charge that the sale was made without any publication, the commissioner, who was principal defendant, answering that he has no recollection of any publication, but supposes he made it, because it was his duty to do so, no order for publication or proof of publication being in the record, is evidence that there was no publication. *Ib.*
3. *Practice. Answer as cross bill.* Answer cannot be treated as cross bill, unless security is given. *Curd v. Davis*, 574.
4. *Decree nunc pro tunc.* Decree entered *nunc pro tunc* in Chancery, held proper. *Newland v. Gaines*, 720.
5. *Interlocutory orders.* What order the Supreme Court has power to supersede. *Mabry v. Ross*, 769.
6. *Decree. Final. What is.* *Meek v. Mathis*, 534. *Harrison v. Farnsworth*, 751.

CHANCERY PRACTICE—*Continued.*

7. *Same. Power of Court over.* A decree pronounced, but not entered, is within the control of the Court. *Abbott v. Fagg*, 742.
8. *Decree correcting omission.* The adjustment of advancements having been omitted in a distribution of the proceeds of a sale for partition, they were allowed to be adjusted in the distribution of rents. *Evans v. Evans*, 577.
9. *Parties.* Owner of legal title must be a party where equitable title is attached. *Lane v. Marshall*, 30.

See CHANCERY SALE, 10. ATTACHMENT, 26-27.

CHANCERY SALE.

1. *Process. Service of, on infants.* A sale of land upon petition of the administrator to pay debts, without service of process upon infant heirs, who have no regular guardians, is void. *Taylor v. Walker*, 734.
2. *Same. Proof of service.* Where neither the issue or service of process appears, by production of the process, nor by anything upon the dockets of the court, and they are not assumed in the decree, the decree for sale will be held void. *Ib.*
3. *Same. Guardian ad litem.* Issue and service of process should precede the appointment of a guardian *ad litem*. *Ib.*
4. *Infant. Decree without service. Appearance of guardian ad litem.* An answer by a person as guardian, *etc.*, where the record shows that there was no guardian when the bill was filed, but the bill promises to procure one at the next term; with no record to show that such regular guardian was appointed, and no order to appoint a guardian *ad litem*, and no service of process on the infant, will not support a sale. *Rucker v. Moore*, 726.
5. *Revivor. Sci. fa. After.* A revivor on motion, at the term when the death of the ancestor is proved, against his widow and heirs at law, is void, and a *scire facias*, issued afterwards to warn them, is a nullity. As to infants, such a proceeding will not authorize the appointment of a guardian *ad litem*, and his appointment and answer will not confer jurisdiction. *Ib.*
6. *Purchase by administrator. Complainant.* Where an administrator buys at a sale procured on his own petition, proof of the utmost fairness will be required of him, or any purchaser under him, to sustain the sale. *Taylor v. Walker*, 734.
7. *Same.* Where the property is reported as sold to one "as administrator," it is held as evidence that the purchase was made in his official, not his personal, character; and a subsequent decree, vesting him personally with the title, will be held not to pursue the Master's report of the sale, and he will be treated as a trustee. *Ib.*

CHANCERY SALE—*Continued.*

8. *Estoppel. Sworn petition and purchase.* An administrator stating a title in his intestate in a sworn petition, and purchasing at the sale, held estopped to deny the title of the heirs of his intestate. *Ib.*
9. *Void sale. Account on setting aside.* A purchaser at a void sale, who has bought in a dower interest, being charged with rents and profits, is allowed credit for the amount actually paid for the dower. *Ib.*
10. *Parties. Personal representative.* The personal representative of a distributee, if not a party absolutely necessary in a bill to sell slaves, was a highly proper one. *Rucker v. Moore, 726.*
11. *Property of infant. Proof to authorize.* The evidence of witnesses not acquainted with the property, who gave their opinion as to the propriety of a sale without assigning any reason, is not proper evidence on which to decree a sale of property of minors. *Ib.*
12. *Decree. Notice or advertisement.* A decree of sale not directing any notice or advertisement, and no sufficient evidence appearing of notice or advertisement, is not proper. *Ib.*
13. *Appointee to sell.* So of a decree that A. B. sell without showing in what capacity or office he is to sell. *Ib.*
14. *Purchaser. Not compelled to complete void sale.* Where the proceedings under which a sale is made are absolutely void, the purchaser cannot be compelled to accept the title, and he may be discharged. *Ib.*
15. *Power of Court over payment of debt.* At any time before confirmation of a Chancery sale, under attachment against a non-resident, it may be set aside, on payment of the attaching creditor's debt, though the bidder be a third person. Regularly, the application should be made before the confirmation is ordered; but the party being thrown off his guard by a promise from complainant's attorney to take the money, it was allowed to be made afterward, during the term at which the confirmation was had. *Abbott v. Fagg, 742.*
16. *Opening biddings.* That the price was grossly inadequate, and that the parties interested did not attend the sale—one, because he was attending on a sick member of his family; the other, because he had no notice; that the property was sold at the court-house, when it would have brought a better price on the premises, and that it was sold without "notice in the proper newspaper," are reasons which will support an application to open biddings before confirmation. *Newland v. Gaines, 720.*
17. *Assignee of purchaser becomes party by what.* A purchaser at Chancery sale becomes a *quasi* party to the suit, upon the report of the Clerk and Master and his purchase notes. An assignee of the purchaser, in like manner, becomes a party, upon a report of the assignment by the Clerk and Master, or upon being recognized by the Court; but

CHANCERY SALE—*Continued.*

- upon an agreement in *pais*, not filed as evidence, or regularly made part of the record, such assignee cannot prosecute an appeal. *Ib.*
18. *Same.* An assignment of a bid, after the sale had been set aside and the biddings opened, and a sale had, is a sale of "pretended claim," and is illegal. *Ib.*
19. *Judgment by motion. Against purchaser in County Court.* A judgment or decree of a County Court, by motion against a purchaser of property under a decree of that court, must recite all the facts necessary to give the Court jurisdiction, and to authorize the judgment. *Rucker v. Moore*, 726.
20. *Same. Defects in.* A judgment entitled in the name of the commissioner to sell *v.* the purchaser and the securities for the purchase notes, and describing the plaintiff as commissioner in "this cause"—not in the original cause—is void. *Ib.*
21. *Not aided by other records.* The record of the original cause cannot be looked to in aid of the judgment. *Ib.*
22. *Same. Requisites of.* The judgment must recite the appointment of the commissioner to sell, by what court made, by what authority he is to sell, in what suit, for whose benefit, and for what purpose, that the proper parties are before the Court, and the order or decree for sale. *Ib.*

CLERICAL ERROR.

This Court will correct a clerical mistake by the context and sense, *Creamer v. Ford*. 307.

CLERK AND MASTER.

Not entitled to enjoin action at law against him for selling property under decree. *Huddleston v. Williams*, 579.

CLERK OF CIRCUIT COURT.

Not his duty to file record for writ of error. See SUPREME COURT, 3. *Gillespie v. Goddard*, 777.

CLOUD UPON TITLE.

Sheriff deed. A party in possession of land has a right to remove as a cloud, a claim under execution sale, without averring that the Sheriff had made a deed, which, it seems, may be presumed. *Anderson v. Talbot*, 407.

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COLLATERAL SECURITY.

1. *Confederate Treasury notes.* Where a debtor transferred a note payable in Confederate Treasury notes, to be credited, if paid, otherwise he to stand bound for the original debt; held that the contract was not affected by the Confederate consideration of the note, and was not a contract to pay in Confederate notes. *Marshall v. Dodson*, 95.
2. *Conversion.* A bailee holding a note as collateral security or as agent, held liable for conversion of the note, for having taken Confederate money in payment. *Scruggs v. Luster*, 150.

COMMISSIONER.

Appointee to sell land. A decree that A. B. sell without showing in what capacity or office he is to sell, is not regular. *Rucker v. Moore*, 726.

CONCEALMENT.

Innocent omission, not. *Southern Express Co. v. Womack*, 256.

CONDEMNATION OF LAND.

On void attachment, will be denied. *Sullivan v. Fugate*. 20.

CONDITIONAL SALE.

Mortgage. A writing, reciting a purchase of a negro, for "which I have agreed to pay \$1,200," as shown by bill of sale, and stipulating for a conveyance to a wife and child of the vendor, when the sum of \$575 should be paid to the vendee, he having paid so much of the \$1,200, held not to be a mortgage, but a sale. *Burts v. Erans*, 420.

CONFEDERATE TREASURY NOTES.

1. *Query*. Is the fact that a note is given in consideration of Confederate notes, a defense? *Hays v. Crawford*, 80.
2. Collateral security in. See *Marshall v. Dodson*, 95.
3. *Payment in, executed*. To bring a payment in Confederate currency, made on a note, within the rule as to executed contracts, it is not necessary that the payment be of the entire sum due, nor that it be indorsed as a credit on the note. *Cross v. Sells*, 83.
4. *Sale for*. A party who has sold property for Confederate Treasury notes, can not, upon a tender of the Confederate notes, refuse to accept them and bring detinue or trover for the property. *Williams v. Elkins*, 88.
5. *Question reserved*. Whether he can recover for the value of the property, query? *Ib.*
6. *Payment to Clerk in*. *When good by estoppel*. Where the administrator and distributees interested in a Chancery sale made in 1861, were all present at the sale, and one of them joined the commissioners in the declaration that when the notes fell due, they would take whatever might be the currency in use, and the others made no objection, and the Clerk, by direction of the administrator, took Confederate bonds and notes, it was held that the Clerk could not be made personally liable for the loss. *Clevenger v. Clevenger*, 104.
7. *Renewal*. Notes being given in consideration of Confederate Treasury notes, were indorsed *with recourse*; the assignee surrendered the notes, and the maker executed a new note. Held, that if the want or character of consideration affected the original notes, the defense was waived by executing a new note, without notice to the payee of the facts. *Torbett v. Worthy*, 107.
8. *Consideration*. Confederate Treasury notes possessed during the existence of the "Confederate States," such elements of value as rendered the loan of them a valuable consideration, which would support a contract. *Naff v. Crawford*, 111.
9. *Contract to pay not illegal*. A contract made in the ordinary course of business, within the territory of the Confederate States, and not with

CONFEDERATE TREASURY NOTES—Continued.

any express view to give aid to the Confederates, will not be held unlawful for the reason only that it is payable in Confederate Treasury notes. *Ib.*

10. *Note in renewal of note to pay.* A note for current bank notes, given in lieu of a previously existing note, to pay the same amount in Confederate currency, which was executed in consideration of a loan of Confederate money, is not invalid by reason of the consideration on which it is founded. *Ib.*
11. *Not illegal. Case approved.* The judgment in *Thorington v. Smith*, 9 Wal., 1, approved, holding that Confederate Treasury notes were issued and imposed on the community by irresistible force; that the use of them by parties who had no illegal purpose in such use, was not unlawful. *Sherfy v. Argenbright*, 128.
12. *Enemy relation.* Confederate Treasury notes, as a consideration passing from a person resident within the Confederate lines, to an attorney in fact of one resident in the loyal States, were not a valid and legal consideration. *Conley v. Burson*, 145.
13. Such payment amounts to a mere deposit, to the use of the payor. *Ib*
14. *Payment in, to agent or bailee.* A note placed in the hands of another as a collateral security, or as agent for collection, being paid to the holder in Confederate money, did not bind the payee or release the debtor, where the payor knew the nature of the holder's right, or was put upon inquiry as to it. *Scruggs v. Luster*, 150.
15. *Value to be accounted for.* The bailee having received Confederate notes, will be required to account to the payor for their value at the time they were received. *Ib.*

CONGRESS.

Member of cannot be Judge. *Calloway v. Sturm*, 764.

CONSIDERATION.

1. Where complainant paid, and at the same time took back, Confederate notes as a loan, the consideration should be referred to the original obligation. *Rankin v. Craft*, 711.
2. *Moral obligation.* A promise to pay may be supported by a moral obligation, when the obligation grows out of an original legal obligation which has been extinguished without being performed. *Parker v. Cowan*, 518.

See CONFEDERATE TREASURY NOTES, 1, 7, 8, 10, 11, 12.

CONSOLIDATION.

Of causes in equity. *Herd v. Bewley*, 524.

CONSTITUTIONAL LAW.

1. *Statute of limitation. Power to divest right under.* A right to a defense complete under a statute of limitations, can not be taken away by a statute, ordinance of a Constitutional Convention, or amendment of the Constitution. *Girdner v. Stephens*, 280.
2. *Vacancy. Power of Governor to fill.* On the resignation of a Supreme Judge, under the Constitution of 1835, the Governor had no power to fill the vacancy longer than until the office could be filled by election; and it was his duty to order the election to be held, after the two months, during which, notice was required by law to be given. *Callo-way v. Sturm*, 764.
3. *Same. Under Schedule of 1865.* Section 7 of the Schedule to the Constitution of 1865, did not enlarge the authority of the Governor in this respect. The Governor, under it, had no authority to issue a commission to fill out an unexpired term.

Construed. Article 6, section 7, 765; Article 7, section 11, 766.

CONSTRUCTION.

1. *Distinction between law and equity favored.* In constructing a statute, such a meaning will be given to it as will preserve the distinction between Courts of Law and Equity. *State v. Alder*, 543. *Lane v. Marshall*, 30.
2. *Subsequent statute may affect.* A subsequent statute may be looked to in ascertaining the meaning of terms used in a former one, even in their application to acts happening between the dates of the statutes. *Hart v. Reynolds*. 208.
3. *Stipulation as to accident in contract.* *Storer v. Allen*, 486.

CONTESTED ELECTION.

1. *Not a State case.* A contested election is not a case to which the State is a party, nor is it the duty of the District Attorney to attend to it. *Boring v. Griffith*, 456.
2. *Of Sheriff. Limitation.* The time within which an election of Sheriff is to be contested, is not limited to twenty days after the election. *Ib.*
3. *Same. Trial after induction.* The contest may be tried after the person whose election is contested is inducted into office. *Ib.*
4. *Same. Not triable under Code, 3409.* The contest is not analogous to a bill in the nature of a writ of *quo warranto*, and it cannot be tried under the provisions of the Code, 3409 to 3423. *Ib.*
5. *Same. Practice.* The practice in contested elections of Sheriffs, not being regulated by law, the Circuit Courts may adopt their own practice. *Ib.*
6. *Same. Same.* Where the contestant stated the facts by petition, and

CONTESTED ELECTION—*Continued.*

prayed to make a contest, and the opposing party appeared and moved to dismiss the petition, and then demurred to the form of the proceeding, it was held error to dismiss the cause without a hearing on the merits. *Ib.*

7. *Same. Judgment after term of office expires.* Where the term of service expires before the contest is determined, this Court, upon an appeal by the contestant and a reversal, will not remand the cause but reverse and pronounce judgment for the costs. *Ib.*

CONTRACT.

1. *Illegal. Knowledge not participation.* It seems that a statement that a note was given for a horse, which the seller knew was to be used in "the rebel service," without more, does not show a meritorious defense against the note. *Gillam v. Looney*, 319.
2. *Illegality. Knowledge of, without concurrence.* Mere knowledge of illegality, affecting the subject matter of a contract, does not taint the contract as illegal. *Naff v. Crawford*, 111, 117; *Gillam v. Looney*, 319, 321; *Sherfy v. Argenbright*, 128.
3. *To marry. Made by a person already married.* See MARRIAGE. *Coover v. Davenport*, 368.
4. *Construction. Stipulation as to accident.* A stipulation in a contract for further time to finish a work, if it should be destroyed by inevitable accident, and the absence of any stipulation that the builder should be compensated for labor and material lost by such accident, is clear proof that such loss was to fall upon the builder. The retention by the employer of a large proportion of the compensation until the work is completed and received, is a ground for the same construction. *Stover v. Allen*, 486.
5. *For subsistence at contractor's house. Removal. Compensation.* Complainant, owner of lands, made a deed for the land to a son-in-law, the defendant, in consideration of moneys to be paid, and in consideration that the son-in-law would support the grantor at his house during life, "should he choose to remain there." The grantor voluntarily left the house of the defendant. Held, that the defendant should account for the actual outlay of which he was relieved by the removal of complainant. *Keeler v. Baker*, 639.

See CHANCERY.

CONVERSION.

Taking upon leave of unauthorized person. To take for temporary use, the property of another, in the owner's absence, upon the assurance of the person on whose place the thing is kept, that the owner would not care, but with the knowledge that he had no authority to lend the thing, is a conversion. *Childress v. Ford*, 463.

CONSTITUTIONAL LAW.

1. *Statute of limitation. Power to divest right under.* A right to a defense complete under a statute of limitations, can not be taken away by a statute, ordinance of a Constitutional Convention, or amendment of the Constitution. *Girdner v. Stephens*, 280.
2. *Vacancy. Power of Governor to fill.* On the resignation of a Supreme Judge, under the Constitution of 1835, the Governor had no power to fill the vacancy longer than until the office could be filled by election; and it was his duty to order the election to be held, after the two months, during which, notice was required by law to be given. *Culloy v. Sturm*, 764.
3. *Same. Under Schedule of 1865.* Section 7 of the Schedule to the Constitution of 1865, did not enlarge the authority of the Governor in this respect. The Governor, under it, had no authority to issue a commission to fill out an unexpired term.

Construed. Article 6, section 7, 765; Article 7, section 11, 766.

CONSTRUCTION.

1. *Distinction between law and equity favored.* In constructing a statute, such a meaning will be given to it as will preserve the distinction between Courts of Law and Equity. *State v. Alder*, 543. *Lane v. Marshall*, 30.
2. *Subsequent statute may affect.* A subsequent statute may be looked to in ascertaining the meaning of terms used in a former one, even in their application to acts happening between the dates of the statutes. *Hart v. Reynolds*. 208.
3. *Stipulation as to accident in contract.* *Storer v. Allen*, 486.

CONTESTED ELECTION.

1. *Not a State case.* A contested election is not a case to which the State is a party, nor is it the duty of the District Attorney to attend to it. *Boring v. Griffith*, 456.
2. *Of Sheriff. Limitation.* The time within which an election of Sheriff is to be contested, is not limited to twenty days after the election. *Ib.*
3. *Same. Trial after induction.* The contest may be tried after the person whose election is contested is inducted into office. *Ib.*
4. *Same. Not triable under Code, 3409.* The contest is not analogous to a bill in the nature of a writ of *quo warranto*, and it cannot be tried under the provisions of the Code, 3409 to 3423. *Ib.*
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COSTS.

1. On mandamus, for refusal of Judge to make entries; adjudged against the Judge. *Ingersoll v. Howard*, 247.
2. Bill filed to enforce vendors lien. Widow, by answer, attempts to set up right of dower and fails. Cost of answer and of appeal adjudged against her. *Lane v. Courtney*, 331.
3. *In Chancery. Bond. Surety liable on reversal.* Complainant gave bond, conditioned to prosecute with effect, or to pay the costs that may be decreed by the Chancery Court, on his prosecuting his suit there with effect, and a reversal here—security on the bond held liable for the costs, under Act of 1859–60, ch. 120. *Ogg v. Leinart*, 40.
4. *Judgment for.* On motion in favor of Clerk. *Stuart v. McCuistion*, 427.

See JUDGMENT, 3.

COUNTY COURT.

Order as to road. In an action *qui tam* for altering a public road, the validity of an order of the County Court, authorizing the change, cannot be attacked by evidence *aliunde*, showing that it was not made upon a return of a jury of view. *Stanley v. Sharp*, 417.

CURRENCY.

1. *Note payable in.* Upon a note payable "in the currency of the country, but not in Confederate notes," the recovery will be for the value of such notes as constituted the actual circulation of the country at the maturity of the note, though greatly depreciated below par. *Coffin v. Hill*, 385.
2. *Onus of proof to show depreciation.* On such a note the presumption is, that the currency is at par, and the plaintiff will recover the number of dollars called for, unless proof is introduced to show that the currency was depreciated, and how much. *Ib.*

DAMAGES.

1. *Excessive. New trial for.* In trespass against a conscript officer, when the facts were, an attempt to arrest the defendant in error as a "conscript," an effort by him to escape; a pursuit, in which he was shot at but not hit, and run over by a horse, but not seriously hurt; a capture and detention of from three to five hours; some verbal abuse by one of the parties, repressed by plaintiff in error, after which he escaped, no malice being shown; a verdict for \$8,000 damages was held to be excessive, and new trial granted. *Moore v. Burchfield*, 203.
2. *Exemplary.* Exemplary or vindictive damages, though clearly wrong in theory, are established as the rule in Tennessee. *Dougherty v. Shown*, 302.

DEBT.

Judgment in. The judgment for the debt and damages are separate in the action of debt. *Brandon v. Diggs*, 472.

DECLARATION.

See EVIDENCE, 4, 13 to 21, 30.

DEED.

Maker competent to impeach. See Evidence. *Greene v. Starnes*, 582.

DE FACTO.

Officer. The acts of a Judge acting under a commission, are valid, as acts of an officer *de facto*, and this principle applies to proceedings *ex parte* and at Chambers.

Government. See Government. *Smith v. Brazelton*, 44. *Shirfy v. Argenbright*, 133. *Cummings v. Diggs*, 72.

DEFENDANTS.

Who are. See Pleading. *Dougherty v. Sho* 302.

DEPOSIT.

See CONFEDERATE NOTES, 12, 13.

DEPOSITION.

See EVIDENCE, 25, 26, 27. *Bowley v. Ottinger*, 354. *Hawkins v. McNamara*, 352. *Phipps v. Caldwell*, 349.

DESCENT.

1. *Grand-uncle not ancestor of parent.* Lands descended from a grand-uncle as they do not descend from the ancestor of a parent, are not subject to the rule of the Code, 2420, par. 3, but to that of par. 1, and descend without reference to the source from whence derived. *Penniman v. Francisco*, 511.

2. *Father when heir to child.* In such case, a father, if living, will inherit from his child an estate derived from an uncle on the mother's side, in preference to the heirs of the child, on the part of the mother. *Ib.*

DILIGENCE IN LEGAL PROCEEDINGS.

See CERTIORARI. ERROR *coram nobis*, 1. NEW TRIAL, 3. *Powell v. Cyfers*, 526.

DISCONTINUANCE.

See PLEADING. *Dougherty v. Shown*, 302. ARBITRATION, 1, 2.

DISCOVERY.

See EVIDENCE, 49.

DISTRIBUTION.

Niece preferred to grand niece. A grand niece does not take any share in the distribution of an intestate's estate, where there are brothers and sisters, nephews and nieces. *Penniman v. Francisco*, 511.

DOWER.

1. *Lands held by parol purchase.* A widow is not entitled to dower of lands held by her deceased husband under a parol purchase. He is not the "equitable owner." Code, 2398. *Lane v. Courtney*, 331.
2. *Value of mansion-house not computed.* In the assignment of dower, the widow is entitled to one third in value of the lands of her deceased husband, and the Mansion, &c., to be included in the part allotted, but the value of the improvements is not to be regarded in estimating the quantity to be assigned her, unless the improvements can not be assigned her without manifest injustice to the children. *Vincent v. Vincent*, 333.
3. *Assignment of timber.* A widow is entitled to a rateable and convenient part of the timber as a part of her dower. *Ib.*
4. *Deed in fraud of.* Void. *Reynolds v. Vance*, 344.
5. *Test of fraud.* A gift whereby a husband openly divests himself of property, making a just and reasonable present provision for persons having meritorious claims, and not with a view to defeat or diminish his wife's dower, is not void as in fraud of dower. *Ib.*
6. *Same.* Where a deed was made by a husband to his children, for all the real estate of the grantor, for a recited consideration of \$3,000, a real one of \$300, and of love and affection—was acknowledged for registration on the day it was made, but not put of record for eight years, nor until the grantor died, he remaining in possession until his death, the only reason given for the delay being that it was neglected, it was held void as against the wife. *Ib.*

DURESS.

1. *Presumption of continuing.* No presumption of continuing duress, under the circumstances of the case. *Smith v. Large*, 5.
2. *Father and Son.* A note executed by a father as surety and a son as principal, under the influence of threats that the son would be taken off, and, as the parties reasonably apprehended, killed, is void as to both, for duress. *Owens v. Mynatt*, 675.
3. *Principal and Surety.* A note void for duress as to the principal is void as to the surety. *Ib.*
4. *Proof to support verdict.* Proof that a payor of a note, with a friend, met the payee in the road; payee told him they had come to pay the note; payor went to his son's house and returned, they awaiting his return; went to his house; payee said, "You have come to pay

DURESS—Continued.

that note;" went into another room to get it; counted interest, and took pay in Confederate notes, and delivered note; inquired if they knew who would borrow the money; put it away in another room, and coming out, said he would keep an account of the men who paid him in that kind of money; the payee and friend being unarmed, and using no threats or force, but being rebels, and the payee being Union, and being within the Confederate lines, and "there being a general state of fear in regard to refusing to take Confederate money, many Union men having been arrested." Held, insufficient to prove duress, or to support a verdict. *Rollings v. Cate*, 97.

5. *Charge of Court.* Charge on foregoing facts that, "if through a present exciting fear, a person was forced" to take Confederate money, the payment would not be binding, without anything in charge defining what result feared would suffice, is error. *Ib.*
6. *Evidence.* Proof of a general state of fear, &c., as above, is inadmissible. *Ib.*
7. Where a threat of unlawful mischief or injury to the person, property or good name of a party, is of sufficient importance to destroy his free agency, the law, because of such duress, will not enforce any contract which he may be induced by such threats to make. It is wanting in the essential elements of a valid binding contract, to-wit: the free and voluntary assent of the minds of the parties making it. *McSween v. Miller*, 104, n.
8. *Jurisdiction of Law and Equity concurrent.* The remedies for duress are concurrent in Law and Equity, and whichever first takes jurisdiction obtains exclusive cognizance of the case. *McLin v. Marshall*, 678.

EJECTMENT.

See EVIDENCE, 13, 14, 15.

ENEMY.

1. It by no means follows, that because men were dressed in gray, and fought Federal soldiers dressed in blue, they were such public enemies as were entitled to the benefit of the rights of war. *McAdams v. McChristian*, 245, n.
2. *Public.* United States were, of Confederate States, against whose act a carrier in the latter did not insure. *Southern Express Co. v. Womack*, 256.

EQUITY.

1. *Equitable estate.* Purchaser by parol does not have. *Lane v. Courtney*, 331.
2. *Same.* Cannot be attached at law. *Lane v. Marshall*, 30
3. *Jurisdiction.* See CHANCERY.

ERROR.

1. *Writ of. Lies from decree for alimony.* A writ of error lies from a decree for alimony, incident to a divorce, though the decree as to the divorce can not be reviewed in such proceeding. *McBee v. McBee*, 558.
2. *Same. Notice.* Notice of writ of error is waived by appearance, and moving to dismiss for want of notice. *Ib.*
3. *Charge of Judge. Ratification.* Where there was evidence to prove the ratification by the principal of an unauthorized exchange made by an agent, by acceptance of the property taken in exchange, and the Court was requested to charge that if the plaintiff accepted the property with full knowledge of the facts, and kept it, &c., that would be a ratification; but the Court refused, and charged that if a party ratifies a void contract, it becomes binding on him. It was held error, for the refusal, and the charge given is calculated to mislead the jury. *Evans v. Buckner*, 291.
Charge of Court. On facts. A charge that a contract is a contract to pay in Confederate money, is a charge on the facts, and is error. *Marshall v. Dodson*, 95.
5. *Same. Same.* To charge that repeated efforts to *oust* a party, or repeated searches for him for that purpose, would be grounds of apprehension, and the party might abandon his home, and hold him thus pursuing liable in damages for ejecting or driving him from home, is an invasion of the province of the jury, and is error. *Ellis v. Spurgin*, 74.
6. *Threats.* The Court having admitted vague threats against Union men who had been troubling the plaintiff in error, charged the jury that they could only look to the threats if they were satisfied that they were aimed at the defendant. There being evidence that the plaintiff was believed by defendant to be out of the country, it was held that the evidence of the threats, if admissible at all, should have been submitted in connection with the fact of plaintiff's supposed absence. *Witt v. Haun*, 160.
7. *Same. Bill of exceptions.* Where a bill of exceptions is taken, with no exception to the charge of the Court, it will be presumed on error that all proper instructions were given. *Wolfe v. Tyler*, 313.
8. Party can not complain of errors in his favor. *Hays v. Crawford*, 86.
9. *Reversal. Purchaser. How affected.* A decree under which a sale has been made will be reversed, if erroneous, leaving the parties to settle their rights under the Code, 3186, which provides that a reversal on a writ of error shall not affect the rights of purchasers, acquired before the writ was granted. *McBee v. McBee*, 558.
10. Judgment by motion not aided by bill of exceptions. *Stuart v. McCuiston*, 427.
11. Not remanded to make amendment, equivalent to new suit. *Ib.*
 See APPEAL, 11, 12, 13. BILL OF EXCEPTIONS.

ERROR CORAM NOBIS.

1. *Misnomer. Diligence.* A party sued, by the name of T. M. Brannon, on a note purporting to be signed by the name of G. M. Branda, returned as served by his true name, Brandon, declared against as Brannon, without profert of the note, employed counsel before the war, who informed him he could find no declaration, a declaration having been in fact filed; after the war, went with his attorney and searched for the papers, which could not be found; but at that term, judgment final by default, was taken. Held, not sufficient to support a writ of error *coram nobis*. *Brandon v. Diggs*, 472.
2. *Whether cause is litigated, matter of fact.* A judgment dismissing for want of sufficient bond, and awarding writ of inquiry against a plaintiff, in replevin in which witnesses had been summoned on both sides, though there was no plea, taken and executed, on a day of the term after the continuance of all "*litigated*" civil causes, and after the plaintiff and his witnesses had left the court, is irregular and erroneous. Such error may be reached by writ of error *coram nobis*. *Crouch v. Mullinix*, 478.

ESTOPPEL.

Sworn petition and purchase. An administrator stating a title in his intestate in a sworn petition, and purchasing at the sale, held estopped to deny the title of the heirs of his intestate. *Taylor v. Walker*, 734.

EVIDENCE.

1. Printed form of Express Company not shown to have been used, not evidence to raise the question of restricted liability. *Sou. Exp. Co. v. Womack*, 256.
2. *Primary and secondary. Design of a writing.* The Court admitted evidence to prove the "existence and design" of a bond, "not its contents." This was error. The design must be proved by its contents. *Smith v. Large*, 5.
3. *Confederate States. Accounting for original papers of.* The fact that a paper relates to the business of an extinct political organization, is not a ground on which secondary evidence is admitted, without accounting for the primary evidence. *Ib.*
4. *Conversation not to be admitted partially.* When part of a conversation is admitted in evidence, it is error to exclude another part, to which the part admitted is a reply, and without which the part admitted is hardly intelligible, though the part so excluded might of itself be irrelevant to the issue. *Ib.*
5. *Secondary. Grounds for.* To allow the introduction of secondary evidence of a letter, it is not sufficient to show that the writing was last in the possession of a person deceased, without some proof of inquiry for it from his family, or personal representative, or other person likely to have custody of his papers. *Girdner v. Walker*, 186.

EVIDENCE—*Continued.*

6. *Contents of writing.* Proof that letters "counseled an arrest," is not admissible, as being the conclusion of the witness, not the contents of the letter. *Ib.*
7. *Affidavit of loss.* If not made part of record by bill of exceptions, will be presumed sufficient, though the bill of exceptions purport to set out all the evidence. *Sou. Exp. Co. v. Womack*, 256.
8. *Receipt. Delivery.* Delivery of property may be proved, though a receipt be given, without accounting for the receipt. *Ib.*
9. *Parol evidence* is admissible to prove the official character of an officer of the Confederate States. *Cummings v. Diggs*, 67.
10. Dress of soldiers not sufficient to prove legality of capture. *Branner v. Felkner*, 228.
11. With other facts. *Chesney v. Rogers*, 239.
12. Government brand not enough to prove title. *Dawson v. Susong*, 243.
13. *Inejctment. Statement of deceased witness before proccessioning jury.* In ejctment, it is error to admit evidence of what a deceased witness stated before a proccessioning jury as to the locality of a corner, without proving that the proccessioning was regularly instituted, and between the same parties, and that the statement was made under oath, or that the jury were on the premises, or at the corner in question. *Draper v. Stanley*, 432.
14. The Court does not hold, that, with these requisites, the evidence would be admissible. *Ib.*
15. *Same. Declarations of deceased agent as to corner called for.* The admission of testimony, that a deceased person stated, as to the locality of a corner, that he, as agent of the former owner, made a deed for the land, and made it to a particular spot, as the corner, was held to be error, for want of proof of knowledge of the corner, and also because it is contradicting the deed made by the declarant, the party in interest not being shown to have been present. *Ib.*
16. *Declarations. Res gestæ.* Declarations of a party taking property, not admissible for a defendant charged with complicity, though made soon after the taking, and while returning from the place of taking, with the property. *Smith v. Carr*, 173.
17. *Res gestæ. Rebutting.* Declarations of the plaintiff in error before a Lieutenant of the Confederate army being admitted, evidence of what the Lieutenant said, at the same time, is admissible as part of the *res gestæ*, or to rebut what the plaintiff in error said. *Swaggerty v. Caton*, 199.
18. *Same.* In a suit against members of a military organization—what

EVIDENCE—*Continued.*

was said in the absence of defendants by others, as to the designs of the company, while engaged in enlisting men for it, and declarations as to the acts complained of, are not admissible against the defendants. *Lyons v. Wattenbarger*, 193.

19. Evidence of what a deceased party said is not admissible to show that he had just been to a particular place and performed a particular act. *Day v. McGinnis*, 310.
20. *Res gestæ.* Declarations of the plaintiff's testator, made at the time of leaving home, as to his motive and intention, were not admissible as evidence in a suit for driving him from home. *Parkey v. Yeary*, 157.
21. *Same.* Declarations as to an injury received are only admissible when made before the party has time to devise any thing for his own advantage. *Ib.*
22. *Maker. To impeach deed.* The maker of a deed is not precluded from giving evidence to impeach it for fraud against creditors. *Greene v. Starnes*, 582.
23. *Warrantor.* A warrantor before the Act of November 26, 1869, was incompetent, by reason of interest, to prove the validity of his own conveyance. *Ib.*
24. *Loan or deposit.* A note given to pay, written by complainant himself, a man of fair business capacity; a charge in a bill that he has the money, without a charge that he kept it as a special deposit, and a failure to bring it into court, though worthless, are all circumstances against a deposit, clearly establishing a loan. *Rankin v. Craft*, 711.
25. *Deposition. Exception. Amendment of caption.* A Clerk having sustained exceptions to a deposition, the party by whom it was taken, without praying an appeal, moved the Court to allow the Commissioner to amend the caption, which was done before trial, held to be no error. The deposition was then allowed to be read on the trial, and properly. Code, 2863, construed. *Bewley and Bible v. Ottinger*, 354.
26. *Same. Exception.* Depositions taken before a J. P., excepted to before the Clerk on appeal, and exceptions allowed, can not be admitted by the Court on the trial. The action of the Clerk is conclusive, unless appealed from and reversed before the trial begins. Code, 3869. *Hawkins v. McNamara*, 352.
27. *Same. Caption. Several suits.* Two plaintiffs having suits against the same defendant in the same court, took, under one caption and certificate, the depositions of several witnesses, at the same time and place, a portion of the depositions to be read in one case, and a portion in the other. Held, on exception to one of said depositions, that it was error to admit it as evidence in either case. *Phipps v. Caldwell*, 349.

EVIDENCE—Continued.

28. *Irrelevancy. Bill of Exceptions.* Evidence of a separate act of the defendant in a suit not connected with the one sued upon, is not admissible, and being admitted will be a cause of reversal, though the bill of exceptions does not purport to contain all the evidence. *Massengill v. Shadden*, 357.
29. *Same. Error.* A witness in an action of trespass for molesting the plaintiff, an Union man, was allowed to prove that the object of the "Southern Greys," an organization with which the defendant was not connected by the proof, was to arrest Union men, and bring them in and make them take the "Southern oath." Held error, being irrelevant to the issue, and being the conclusion of the witness, not a statement of the facts. *Girdner v. Walker*, 186.
30. *Incompetent.* Evidence of what a member of the "Southern Greys" said to the plaintiff, held incompetent evidence, there being in the facts nothing to connect defendant with the "Greys," or with the particular member. *Ib.*
31. *Acts of Family.* Acts of the family of a defendant in trespass, with which he is not shown to have been connected, are not admissible evidence against him. *Heatherly v. Bridges*, 220.
32. *Objection.* Evidence objected to may so connect itself with other evidence not objected to, as to make its admission error when it would not otherwise be so. *Ib.*
33. *To rebut what is excluded. Error.* Material evidence admitted as rebutting to what was excluded by the Court, is a cause for a new trial. 78.
34. Vague threats against Union men who had troubled the plaintiff, and proof that the party making the threats believed the plaintiff to be out of the country, must be taken together, to see if the plaintiff was meant. *Witt v. Haun*, 160.
35. *Parties as witnesses.* The Act of 1867-8, c. 75, allowing persons interested in causes to be witnesses, did not take effect until it was put in operation by the Act of December, 17, 1868, c. 7. *Day v. McGinnis*, 310.
36. *To support verdict.* This Court will only reverse upon conflicting evidence of facts, where there is a great preponderance of evidence against the verdict, so that the Court can see clearly that the judgment of the law upon all the facts shown in the evidence is not that which the jury have found. *Mitchell v. Haney*, 177.
37. *Same.* Where the defendant had a son "captured" by a party of Union men going out of East Tennessee to Kentucky, during the civil war, and sent information to Strawberry Plains, where was some unorganized Confederate force, with a view to have them rescue his son, which information was received at 11 o'clock; at 12 o'clock, the

EVIDENCE—*Continued.*

same day, Captain Ashby and a force left Knoxville, 16 miles off, and captured a large body of men, with which the party first named had formed a junction; no force from the Plains being present or co-operating; no railroad train having gone from the Plains to Knoxville; there being no telegraph station there; and no proof being made of a courier being sent, and there being abundant means by which the information might have come from other sources to Knoxville; it was held there was not sufficient proof that the defendant had been in any way instrumental in the capture, to sustain a verdict in favor of one of the persons captured. *Ib.*

38. *What will support verdict.* Proof that the plaintiff in error was a rebel; that he rode with rebel officers and soldiers across his own land, to a place of encampment common to both armies; that he pointed in a direction which might indicate the land of the defendant in error, or of other adjoining proprietors; that timber was cut off the land of defendant in error, without cutting any from that of the plaintiff in error; and that the property of the former was taken, and that of the latter left, without testimony to show that these acts were done by the advice of the plaintiff in error, is no evidence to support a verdict against the plaintiff in error for trespasses committed by the soldiers. *Smith v. Brazelton*, 44.
39. *To support verdict.* What evidence is sufficient to support a verdict. *Witt v. Haun*, 160; *Rollings v. Cate*, 97.
40. *Verdict. Proof to support.* That the plaintiff had his horse concealed, and while so concealed two Confederate soldiers found and took him; that the defendant was out two or three days before, looking for a stolen mule; met a squad of soldiers, who asked him if the plaintiff and others did not have horses, to which he replied that they had, and that he was a rebel, is no evidence to show that he had anything to do with the taking. *Smith v. Carr*, 173.
41. *To support verdict.* Proof that the defendant came to a house near the plaintiff's with a party of Southern cavalry; that he was in search of his son, who had been taken off by the party of Federal soldiers of whom the rebels were in pursuit; that he was seen talking with the officer in command, who had previously ordered horses to be collected, and who wanted to employ a courier; that he was seen pointing in various directions; that he disappeared, but before he had time to have aided them, some rebel soldiers came up with the plaintiff's horse, for the taking of which this suit was brought. Held, that this proof, though a ground of possible inference that the defendant indicated the taking of the horse, is not sufficient proof to support a verdict. *Lay v. Huddleston*, 167.
42. *Same.* In trespass for driving the plaintiff's intestate from his home, causing him to be exposed to inclemencies of weather, whereof he

EVIDENCE—*Continued.*

sickened and died—held, that proof of injuries received in a fight in November, 1861; of his leaving in April, 1862; driving teams until December; then teaching a short time; then driving teams; being exposed therein to bad weather, and dying in January, 1863, he attributing his death to exposure, was no proof to support a verdict for the plaintiff. *Parkey v. Yeary*, 157.

43. *Verdict. Proof to support.* The testimony in a cause being legitimate, and making a *prima facie* case, a verdict will not be reversed on a preponderance of proof. *Massengill v. Shadden*, 357.
44. *Proximate cause.* Where the house of a deserter from the rebel army was visited by a Confederate enrolling officer, with a squad of soldiers, whereupon he left home, and was absent about twenty months, the Court intimate that the absence cannot be attributed to the visit of the officer. *Ellis v. Spurgin*, 74.
45. *Parol. To prove official character.* Parol evidence is admissible to prove that a defendant was a Confederate officer. *Cummings v. Diggs*, 67.
46. To set up trusts. See TRUSTS. *Click v. Click*, 607; *Gass v. Gass*, 613; *Susong v. Williams*, 625.
47. *Practice. Witnesses. The rule.* It is error to refuse, in a civil case, to place witnesses under the rule, where it is asked upon affidavit of its necessity. *Rainwater v. Elmore*, 363; *Dougherty v. Shown*, 302.
48. *Practice.* Admission of evidence on the part of the plaintiff, not strictly rebutting, after evidence for the defendant is closed, is matter in the discretion of the court below. *Hays v. Crawford*, 86.
49. *Petition for discovery.* Answer to a petition for discovery may be read or not, by the party calling for it. It must be shown that it was read, and made part of the bill of exceptions. *Ib.*
50. *Practice.* Admission of irrelevant matter before a jury, and its subsequent withdrawal, though not error, is strongly reprehended. *Heutherly v. Bridges*, 220.
51. *Grounds for contradiction.* Where a witness was asked as to a conversation, with a view to contradict him, the place and the conversation being stated, the time being fixed as a *short time* before a certain named event, the actual time being about three weeks before the event, the transaction having occurred several years before, it was held sufficient to admit the impeaching statement. *Witt v. Haun*, 160.
52. *Political opinions not relevant.* In trespass for taking a horse, the political opinions of the parties are not in issue, and proof that one was a rebel and the other "Union," is not relevant. *Starnes v. Hubbs*, 196.

EVIDENCE—*Continued.*

53. *Same.* It is error to permit a defendant to prove the "disloyalty" of the plaintiff in a civil action, for trespass in taking goods. *Hart v. Reynolds*, 208.
54. But while in most cases foreign to the issue, it may, in cases of circumstantial evidence, form part of the chain, and become legitimate proof. *Smith v. Brazelton*, 44.
55. As where the question is one affecting the action of persons during the war, which may be controlled by their relation to the one party or the other. *Ellis v. Spurgin*, 74.
56. Or where the question of duress is involved in a transaction during the war. *Smith v. Cottrell*, 197.
57. Or to show the *animus* of defendant in making certain declarations. *Smith v. Carr*, 173.
58. *Same.* *How proved.* If the political status of a party is to be proved, it must be done by acts and declarations, not by hearsay or reputation. *Hart v. Reynolds*, 208.
59. Or, more improperly, by the mere judgment of the witness, or by showing "that he bore the name of a rebel," or that he was influential with rebels. *Swaggerty v. Caton*, 199.

See BILL OF EXCEPTIONS.

EXCEPTION.

See DEPOSITION.

EXECUTION.

1. *Mandamus*, in the nature of execution. *Newman v. Justices of Scott*, 787.
2. *Sale.* *On judgment of a J. P. Return of papers to Court.* It is not, perhaps, essential to the validity of a condemnation and sale of land on a justice's judgment, that the papers should be returned and the condemnation had at the next term of the Circuit Court after the levy. Code, 3080. But unless they are returned within a reasonable time, the lien is lost; and a *bona fide* purchaser from the debtor, by sale made and deed registered after levy and before the condemnation, will acquire a good title as against the purchaser at execution sale. *Anderson v. Talbot*, 407.
3. *Same.* *Case in judgment.* A levy made on the 11th of January, 1862; sale by debtor to complainant, 27th October, 1862; papers of J. P. returned to March Term, 1866, the war intervening; Sheriff's sale, 14th of July, 1866. Held *prima facie* invalid, on demurrer. *Ib.*
4. *Levy on land of surety.* *Without return of no property as to principal.* A levy on the land of a surety is not void because the return does not

EXECUTION—Continued.

show that there was no property, real or personal, of the principal to be found. The Code, 3028, 3029, is directory. If the surety submits, no other person can complain. *Ib.*

5. Sheriff's deed a cloud upon title. *Ib.*

6. *Property exempt from. Federal Courts.* Laws of this State exempting property from execution, except such as were passed prior to the U. S. Process Act of 1828, are not operative against executions issued from the United States Courts. *Rogers v. McKenzie*, 514.

7. *Same. Horse not.* A horse is not exempt from sale under execution from the Federal Courts. *Ib.*

8. Satisfaction of. Setting aside. *Lane v. Marshall*, 30; *Swaggerty v. Smith*, 403.

EXEMPTION.

From execution. See EXECUTION, 6, 7.

EXONERATION.

Bill may be filed by surety for, before judgment. *Greene v. Starnes*, 582.

FATHER AND SON.

See DURESS.

FIAT.

See CERTIORARI, 4.

FIDUCIARY RELATION.

1. *Burden of proof imposed by.* A son employed by a father to procure a deed intended to defraud a wife of her dower, stands in such fiduciary relation, that having procured the deed to him and a brother, in exclusion of the other heirs, the father being at the time aged, infirm, and in a distressed state of mind, though capable of making a deed, and he having afterward made declarations making it probable that he had been imposed on—the sons will be held to strict proof of fairness and good faith in the transaction, and of a full comprehension by the father of its terms; or, in the absence of such proof, the deed will be set aside. *Martin v. Martin*, 644.

2. *Effect of one fraud upon another.* The deed having been set aside before, as to the wife, did not affect its validity as to the other children. But the specific intent to defeat the wife might enable the son to dictate the terms in other particulars, so as more readily to escape the observation of the father. *Ib.*

See ADMINISTRATION. *Taylor v. Walker*, 734; *Gass v. Gass*, 613.

FORCIBLE ENTRY AND DETAINER.

1. *Description of premises.* In a warrant for forcible entry and detainer, of a school house, a description as a school house in the 10th Civil district of Union County, known as Miller's School House, is sufficiently certain. *Butcher v. Palmer*, 431.
2. *Complaint.* No written complaint is required in forcible entry and detainer. *Ib.*

FRAUD.

1. *Evidence.* Fraud, always conceived in cunning and difficult of proof, is properly proved by circumstances. *Parrott v. Parrott*, 681.
2. *Chancery jurisdiction. Rescission.* In the cancellation, rescission or reformation of deeds and other instruments for fraud, accident, &c., the jurisdiction of the Chancery Court is unembarrassed, and its remedies complete. *Ib.*
3. *Same. Case in judgment.* In a case where it appears that a father, growing helpless with old age, had deposited an absolute deed of his lands to his son, with a neighbor, upon the promise of his son to execute a bond for the support of the grantor and his wife for life, and upon the execution of said bond the deed to be delivered to grantee; and it appeared that after the lapse of several years, with no sufficient excuse the bond had not been executed; and the son, combining with the depository of the deed, had caused the clandestine registration thereof, a court of equity will deduce a fraudulent purpose, and decree the cancellation of the deed. *Ib.*
4. An award may be set aside for fraud. *Matthews v. Matthews*, 669.
5. *Fraud on Government.* A conveyance of property during the war, with intent to evade confiscation, was not an abandonment of the property sold, which would authorize the seizure of it. *Hurt v. Reynolds*, 208. See *Susong v. Williams*, 625.

FRAUDULENT CONVEYANCE.

1. *Priority. Creditor of vendor, and alimony to wife of vendee.* The right of a creditor, filing a bill to set aside a fraudulent conveyance to a husband, is preferred to the claim of the wife to alimony, not ripened into a decree at the filing of the creditor's bill. *Greene v. Starnes*, 582.
2. *Relationship.* Relationship between parties to a conveyance, is a circumstance, not of itself evidence of fraud. *Sporrer v. Eijler*, 633. See *Walter v. McNabb*, 703.
3. *Deed in fraud of dower. Test of fraud.* A gift whereby a husband actually and openly divests himself of his property, and of the enjoyment of it in his life-time, in favor of children and others, making, according to the circumstances of his family, a just and reasonable present provision for persons having meritorious claims, and not with a view to

FRAUDULENT CONVEYANCE—*Continued.*

defeat or diminish his wife's dower, is not void as in fraud of dower. *Reynolds v. Vance*, 344.

4. *Same.* Where a deed was made by a husband to his three children, conveying to them all the real estate of the grantor *in presenti* for a recited consideration of \$3,000, a real one of \$300, and of love and affection—was acknowledged for registration on the day it was made. But not put of record for eight years, nor until the grantor died, he remaining in possession until his death, the only reason given for the delay being that it was neglected, it was held void as against the wife. *Ib.*

GOVERNMENT DE FACTO.

States resisting the United States. The State governments, during the war against the United States, were *de facto* governments "in the highest degree." *Sherfy v. Argenbright*, 128.

See *Smith v. Brazelton*, 44.

GUARDIAN.

1. *Note made by.* A statement in a bill, that the complainant, as guardian of J. C., executed a note, shows an individual liability on the part of the complainant. *Carter v. Wolfe*, 694.
 2. *Guardian ad litem. Appointment.* The appointment of a guardian *ad litem* "for the minor heirs" of a deceased party, not naming them, is a nullity. *Rucker v. Moore*, 726.
- See CHANCERY SALE, 1, 3, 4, 5. INFANT, 2.

HEIR.

See DESCENT.

HUSBAND AND WIFE.

1. *Action by and against.* A joint action by husband and wife cannot, in general, be sustained against a husband and wife on promises not in writing, made by the wife of the defendant to the wife of plaintiff. The exceptions are stated in the Code, 2805, 2486. Otherwise as to a writing. *Fallwickle v. Keith*, 360.
2. *Merger. Ratification.* Husband and wife executed a joint note for a debt of the wife, contracted before marriage, the husband dying, the wife promised to pay the note. Held, that the note did not extinguish the original debt, and that though not obligatory on the wife during coverture, yet it was capable of ratification, and it was ratified by a promise made after she became discover. *Parker v. Cowan*, 518.
3. *Sole and separate use.* A bequest of personalty to a daughter, living apart from her husband, to her own self (*sic*) and separate use, and her heirs, without the control of her husband, or his heirs or repre-

HUSBAND AND WIFE—*Continued.*

sentatives, to trustees, for her sole and separate use during the continuance of her marriage, upon the dissolution of which it is to be paid over to her, shows a clear intent to exclude the marital right. *Pearson v. Davis*, 593.

4. *Contracts between.* See TRUST. *Click v. Click*, 607.

5. Land conveyed jointly to husband and wife goes to the survivor. *McCollum v. McCollum*, 565, n.

See ALIMONY, 1. ERROR, 1. MARRIAGE, 1.

IDENTITY.

Identity of a name treated as evidence of identity of person. *Newland v. Gaines*, 720.

ILLEGALITY.

Illegal consideration paid to carrier for freight. *Southern Express Company v. Womack*, 256.

See CONTRACT, 1, 2, 3. CONFEDERATE TREASURY NOTES, 9, 11, 12. *Gillam v. Looney*, 319; *Sherfy v. Argenbright*, 128; *Naff v. Crawford*, 111.

INDORSEMENT.

See BILLS AND NOTES. With recourse. *Torbet v. Worthy*, 107.

INJURY.

Resulting in death. See TRESPASS. *Wagner v. Woolsey*, 235.

INTEREST.

1. *On payments of purchase money.* How to be calculated. *Curd v. Davis*, 574.

2. *Compound interest. When not allowed.* A settlement and payment of a debt, with compound interest, where there has been no previous contract to pay interest at stated periods, or to pay interest in that mode, and there is no indulgence granted for the future, or other new consideration for the payment of the compound interest, will be set aside as to the excess of the compound over the simple interest. *Ward v. Brandon*, 490.

3. *Conventional interest law of 1860.* Note need not recite a loan of money. Under the conventional interest law of 1860, it was not necessary that the note, reserving interest at a rate exceeding six per cent. per annum, should show on its face that it was for money loaned. *McGhee v. Trotter*, 453.

INFANT.

1. *Process. Service of.* A sale of land upon petition of the administrator to pay debts, without service of process upon infant heirs, who have no regular guardians, is void. *Taylor v. Walker*, 734.

INFANT—*Continued.*

2. *Decree without service. Appearance of guardian ad litem.* An answer by a person as guardian, *etc.*, where the record shows that there was no guardian when the bill was filed, but the bill promises to procure one at the next term; with no record to show that such regular guardian was appointed, and no order to appoint a guardian *ad litem*, and no service of process on the infant, will not support a sale. *Rucker v. Moore*, 726.

See CHANCERY SALE, 1, 5, 11. GUARDIAN.

INJUNCTION.

1. *Injunction bond. Judgment on.* Where an injunction is obtained against one defendant, against whom the suit is successfully prosecuted, another defendant, who has not been enjoined, cannot have judgment on the bond. *Meek v. Mathis*, 534.
2. Interlocutory order dissolving, not to be superseded by Supreme Court. *Mubry v. Ross*, 769.

JUDGE.

Office of, incompatible with being a member of Congress. *Calloway v. Sturm*, 764.

See OFFICE.

JUDGMENT.

1. *By default. In trespass admits the taking.* On a judgment by default in trespass for taking property specified in the declaration, the taking of the property described is admitted, and the only proof which it is incumbent on the plaintiff to make is as to its value, and he is entitled to a verdict for the value. *Warren v. Kennedy*, 437.
2. *Former judgment. Jurisdiction.* A former judgment of a Justice of the Peace in replevin being set up in defense to a later replevin in Court, it was objected that it did not appear that the justice had jurisdiction of the first replevin, because there was nothing to show that the value of the property was not above one hundred dollars, the judgment being prior to the Act of 1865-6, c. 51. Held, that the justice having taken a bond for two hundred dollars (double value), sufficiently ascertains the value to be one hundred dollars, and that the judgment was a good bar. *Cline v. Gaut*, 399.
3. *For costs. By motion. Requisites of.* A judgment by motion, for costs, under the Code, 3204, must have all the requisites of other judgments by motion. It must show, by sufficient description, the cause in which the costs accrued, and the issue of execution, a sufficient return of the execution showing search and want of property, the production of the execution on the trial of the motion, and the right of the applicant to judgment. *Stuart v. McCuiston*, 427.

JUDGMENT—*Continued.*

4. *Same. Parties.* The Clerk of a Court can only recover his own costs, not those due to others. *Ib.*
5. *Same. Not aided by bill of exceptions.* A defective judgment by motion, without notice, can not be aided by facts appearing in the bill of exceptions. *Ib.*
6. *Same. Remanding to amend.* Where there is a motion without notice, this Court will not correct the judgment, or remand the cause for an amendment equivalent to a new suit. *Ib.*
7. *Judgment in contested election.* See CONTESTED ELECTION. *Boring v. Griffith*, 456.
8. *By motion.* See CHANCERY SALE, 19, 20, 21, 22.

JUDICIAL KNOWLEDGE.

1. *Terms of Court.* This Court can not judicially know whether a particular term of a court was held or not; but it will judicially take notice that courts were re-established after the war prior to July, 1865. *Anderson v Talbot*, 407.
2. *Of locality.* County, county lines, county seats. Comparative distances. *Coover v. Davenport*, 368.

See VENUE.

JURISDICTION.

See JUDGMENT, 2. *Cline v. Gaut*, 399. CHANCERY JURISDICTION. CHANCERY PLEADING 1, 5.

JUROR.

1. *Challenge for cause. Opinions* In a civil case, either party has the right to examine each juror offered, to ascertain whether he has formed or expressed an opinion touching the merits of the case. *Williams v. Godfrey*, 299.
2. *Suitor. Code*, 3988 and 4010, *construed together.* Section 3988 of the Code forbids the appointment of a juror who has a suit pending in the Court at the term to which he is nominated. Section 4010 makes it a cause of challenge that the juror has a cause pending for trial at the term; these are to be construed together. *Riley v. Bussell*, 294.
3. *Policy of section 3988. Construction.* In view of the policy of preventing corrupt combinations among jurors, the restriction is to be favorably construed. *Ib.*
4. *Challenge. Suitor.* It is a good cause of challenge, that a juror has a cause pending, not for trial at the term. Code construed, 3988, 3999, 4010. *Ib.*

LANDLORD AND TENANT.

See LIEN. *Sharp v. Fields*, 571.

Rights of landlord's heir. *Ib.*

LEGAL ESTATE.

Attachment is *prima facie* on legal estate. If an equity is intended, it must be shown. *Lane v. Marshall*, 30.

LIEN.

1. Lien of attachment not lost by amending bond. *Brooks v. Hartman*, 36.
 2. Secret liens are not favored in law, as against innocent purchasers and creditors. *Anderson v. Talbot*, 407.
 3. Attorney's lien for fees on property in litigation. Petition to declare. *Hunt v. McClanahan*, 503.
 4. Landlord's. May be enforced in equity. *Sharp v. Fields*, 571.
- See VENDOR'S LIEN.

LIMITATION.

1. *Must be pleaded.* On a bill filed to set up a presumption of payment, the party can not avail himself of the statute of six years, unless he specially rely on it in his bill, or plead it in some form. *Carter v. Wolfe*, 694.
2. *Statute of. Evidence. Burthen of proof.* Where the intestate died in 1839, the bill to attack the sale was filed in 1859; the complainants state that, at the time of the sale, (in 1840,) they were small children and very young; and the answer made no response to this allegation; the burthen of proof to show that the complainants were of age more than three years before suit, was held to be upon the defendant. *Taylor v. Walker*, 734.

See ADMINISTRATION, 2, 3, 7. *Chesnut v. McBride*, 389. *Herd v. Delp*, 530. CONSTITUTIONAL LAW, 1. *Girdner v. Stephens*, 280.

LIS PENDENS.

Notice of attorney's lien. *Hunt v. McClanahan*, 503.

LOST INSTRUMENTS.

Case may be remanded to supply, when. *Mynatt v. Hubbs*, 323; *Nave v. Nave*, 324.

MAINTENANCE AND SUPPORT.

See CONTRACT. *Keeler v. Baker*, 639.

MANDAMUS.

1. *To County.* A mandamus, to compel the Justices of a county to levy a tax to satisfy a judgment recovered in this Court against the county, is in the nature of an execution. *Newman v. Justices of Scott County*, 787.
2. *To compel Judge to make entries.* Judge a party, and liable for costs. *Ingersoll v. Howard*, 247.

MANSION HOUSE.

See DOWER. *Vincent v. Vincent*, 333.

MARRIAGE.

1. *Promise of. By married man.* A contract by a married man with a single woman, to marry her, if accepted by her in ignorance of his condition, is lawful on her part, and she may recover damages for its breach. *Coover v. Davenport*, 368.
2. *Same. Plaintiff's knowledge after contract not a bar.* In an action for breach of promise, proof that the plaintiff, after the contract was entered into, discovered that the defendant was a married man, and did not at once repudiate the contract, but continued to receive the attentions of the defendant, and urged him to procure a divorce, does not bar a recovery, but goes in diminution of damages. *Ib.*

MERGER.

See HUSBAND AND WIFE, 2. *Parker v. Cowan*, 518.

MISNOMER.

See ERROR CORAM NOBIS. *Brandon v. Diggs*, 472.

MISTAKE.

When rectified in equity. *Sporrer v. Eifler*, 633. *Talley v. Courtney*, 715.

MORTGAGE.

Purchaser with notice. Relief against. A party who purchases a chattel with notice of a mortgage, and keeps it for years pending the suit, can not, on a bill to sell the chattel, upon a recovery by the mortgagor, require him to go upon the property for his debt; but the debt, if less than the original value of the chattel, will be decreed against the purchaser. *Meek v. Mathis*, 534.

See CONDITIONAL SALE.

MOTION.

1. *Judgment by. Against purchaser in County Court.* A judgment or decree of a County Court, by motion against a purchaser of property under a decree of that court, must recite all the facts necessary to give the Court jurisdiction, and to authorize the judgment. *Rucker v. Moore*, 726.
2. *Defects in.* A judgment entitled in the name of the commissioner to sell *v.* the purchaser and the securities for the purchase notes, and describing the plaintiff as commissioner in "this cause"—not in the original cause—is void. *Ib.*
3. *Not aided by other records.* The record of the original cause cannot be looked to in aid of the judgment. *Ib.*
4. *Requisites of.* The judgment must recite the appointment of the commissioner to sell, by what court made, by what authority he is to sell

MOTION—*Continued.*

in what suit, for whose benefit, and for what purpose, that the proper parties are before the Court, and the order or decree for sale. *Ib.*

5. *To dismiss.* See CERTIORARI, 4, 5, 6. PRACTICE, 5, 15, 16. SUPREME COURT. *Gillespie v. Goddard*, 777.

See JUDGMENT, 3, 4, 5, 6. *Stuart v. McCuiston*, 427.

NEW TRIAL.

1. *Surprise. Affidavits.* A statement in an affidavit of a plaintiff, that the matter stated by the witness is untrue, and that plaintiff could not foresee such statement, is a sufficient allegation upon which to base an application for new trial on the ground of surprise. *Sharp v. Treece*, 446.
2. *New proof.* Where affidavits of newly discovered testimony render it probable that if the new matter presented had been before the jury a different verdict would have been rendered, the ground is sufficient. *Ib.*
3. *Bill for. Excuse for not defending.* A bill in equity to obtain a new trial at law, which alleges that the complainant (defendant at law) was prevented by threats of personal violence from attending the court at the time of trial, not stating that the threats were made by the defendant, or that he had anything to do with them, and without showing that the complainant could not have defended by attorney or agent, does not make a case for relief. *Powell v. Cyfers*, 526.

See ERROR.

NUNC PRO TUNC DECREE.

Newland v. Gaines, 720.

OATH.

1. Power of Court to impose. *Ingersoll v. Howard*, 247.
2. *To bill.* See CHANCERY PRACTICE, 1.

OFFICE.

1. *Incompatible. Acceptance of.* The acceptance of the office of Supreme Judge of Tennessee, by a member of Congress, vacates the seat in Congress. His being a member of Congress does not invalidate his right to the office of Judge. *Calloway v. Sturm*, 764.
2. *Of Judge. Vacancy. Power of Governor to fill.* On the resignation of a Supreme Judge, under the Constitution of 1835, the Governor had no power to fill the vacancy longer than until the office could be filled by election; and it was his duty to order the election to be held, after the two months during which notice was required by law to be given. *Ib.*
3. *Same. Under Schedule of 1865.* Section 7 of the Schedule to the

OFFICE—*Continued.*

Constitution of 1865, did not enlarge the authority of the Governor in this respect. The Governor, under it, had no authority to issue a commission to fill out an unexpired term. *Ib.*

4. *Same. Act in excess of power.* A Judge, under such a commission, might lawfully act until the vacancy was filled by election. *Ib.*
5. *De facto.* The acts of a Judge acting under a commission are valid, as acts of an officer *de facto*, and this principle applies to proceedings *ex parte* and at Chambers. *Ib.*
6. *Usurping.* Proceeding for, not applicable to contested election. *Boring v. Griffith*, 456.

OFFICER.

Attorney not an officer. *Ingersoll v. Howard*, 247.

OMISSION.

In decree. See CHANCERY PRACTICE, 8. *Evans v. Evans*, 577.

OVERRULED CASES.

See CASES.

PARENT AND CHILD.

Chancery Court. There are certain principles pertaining to the relation of parent and child, that lie at the foundation of social order and domestic happiness, which a Court of Chancery will regard in adjusting a litigation between parent and child. Filial irreverence and ingratitude are reprobated in a court of equity. *Parrott v. Parrott*, 681.

PARTIES.

1. Act making parties witnesses, took effect December 17, 1868. *Day v. McGinnis*, 310.
2. *Judge. When a party to mandamus. Costs.* If a Judge improperly exclude an attorney from practice, and refuse to put the order on record, or allow him to appeal, he is a proper defendant to a *mandamus*, and liable for costs. *Ingersoll v. Howard*, 247.
3. Want of legal owner of note, formal defect; cured by verdict. *Wolfe v. Tyler*, 313.
4. Owner of legal title must be a party to a bill to attach equitable estate. *Lane v. Marshall*, 30.
5. *Personal representative.* The personal representative of a distributee, if not a party absolutely necessary in a bill to sell slaves, was a highly proper one. *Rucker v. Moore*, 726.
6. If unnecessary parties are misdescribed, it is not material. *Brooks v. Hartman*, 36.

See CHANCERY SALE. PARTNERSHIP.

PARTNERSHIP.

A partner may join in a creditor's bill against his firm. *Brooks v. Hartman*, 36.

See PRACTICE, 8. ADMINISTRATION, 6.

PAUPER.

Suit by. See APPEAL, 2, 11, 12.

PAYMENT.

1. *Right to recover.* It seems that a person making payments to Clerk or distributees, not applied, would be entitled to recover of the parties to whom the payments were made, the amounts paid and not applied by them, after judgment taken by Commissioner who had sold property. *Palmer v. Malone*, 549.
2. *Presumption of.* Presumption of payment is a disputable presumption. *Carter v. Wolfe*, 694.
3. *Same. Suspension of limitation.* It seems that time, during which the statute of limitations is suspended, is not to be computed in raising a presumption of payment from lapse of time. *Ib.*

PLEADING.

1. An account from another county or State must be filed with the declaration and profert made of it; otherwise, the defendant will not be required to deny it on oath. *Hunter v. Anderson*, 1.
2. Plea in abatement to an attachment is not an appearance. See APPEARANCE. *Boon v. Rahl*, 12.
3. *Confederate authority.* A justification by Confederate authority can not be proved in trespass, under a plea of not guilty. *Ellis v. Spurgin*, 74; *Bayless v. Estis*, 78.
4. *Notice of defense.* Notice of special matters of defense under the Code, 2913-2917, should be as certain as a special plea under s. 2916. Notice of a justification in trespass for seizing property, is defective if it does not specify the property taken, or so describe the authority under which the defendant acted, as to inform the plaintiff of the real nature of the defense. *Hart v. Reynolds*, 208.
5. All demurrers must be special. Code, 2924. *Fowler v. Alexander*, 425.
6. *Puis darrien continuance.* A plea *puis darrien continuance* is not, since the Code, a waiver of former pleas. Code, 2892. *Susong v. Jack*, 415.
7. *Same. Costs.* Costs are to be adjudged, not in view of the new plea, but of all the issues. *Ib.*
8. *Puis darrien continuance. Affidavit.* It is error to allow the filing of a plea *puis darrien continuance*, the opposite party objecting, without affidavit of its truth. *Caldwell v. Richmond*, 468.

PLEADING—*Continued.*

9. *Same. Practice. Cause.* It is not error for the Court to allow such plea to be filed without an affidavit accounting for its not being presented sooner. *Ib.*
10. *Continuando.* A declaration in trespass, averring "that, on the 1st day of January, 1864, and at divers other days, before and since that time, to the commencement of this suit," the defendant, with force, &c., took, &c., held to authorize proofs of repeated acts of trespass. *Smith v. Brazelton*, 44.
11. *Aider by verdict.* If this were not so, it is an objection not affecting the merits, and can not, after verdict, prevail in this Court. *Ib.*
12. *Nominal plaintiff.* If a person sue as the bearer of a note for bank notes, not payable to bearer, and not assigned, the want of the proper payee as nominal plaintiff, is matter of form, not in issue on *non est factum*, cured by a verdict, and not fatal in arrest of judgment or on error. *Wolfe v. Tyler*, 313.
13. *Declaration. Variance.* A writing recited a purchase of a negro, for "which I have agreed to pay \$1,200," as shown by bill of sale, and stipulated for a conveyance to a wife and child of the vendor, when the sum of \$575 should be paid to the vendee, he having paid so much of the \$1,200. A declaration *in assumpsit* on this writing, alleged that the defendant undertook, &c., that he would pay the plaintiff \$1,200, evidenced by writing, and made profert; on oyer and demurrer, there was held to be no variance. *Burts v. Evans*, 420.
14. *Discontinuance. Defendants. Who are.* A defendant on whom process has not been served, is not affected by a demurrer, filed by others, describing themselves as "the defendants." He may have a discontinuance ordered for a hiatus in the process as to him. *Dougherty v. Shown*, 302.

POOR.

Suit in forma pauperis. See APPEAL, 2, 11, 12.

PRACTICE.

1. In contested elections. See CONTESTED ELECTION. *Boring v. Griffith*, 456.
2. *Publication.* See ATTACHMENT, 3-6, 17, 19, 20. PUBLICATION.
3. Affidavit for attachment. *Sullivan v. Fugate*, 20; *Moneyhun v. Tarter*, 20; *Forgey v. Anderson*, 20.
4. *Appearance.* Plea in abatement is not. *Boon v. Rahl*, 12.
5. Motion to dismiss writ of error is. *McBee v. McBee*, 558.
6. *Witnesses. The Rule.* A party in a civil case, making affidavit of its necessity, may demand, as of right, that the witnesses be put under the rule. *Dougherty v. Shown*, 302; *Rainwaters v. Elmore*, 363.

PRACTICE—*Continued.*

7. *Deposition. Several suits.* Two plaintiffs having suits against the same defendant in the same court, cannot take, under one caption and certificate, the depositions of several witnesses, at the same time and place, a portion of the depositions to be read in one case, and a portion in the other. *Phipps v. Caldwell*, 349.
8. *Suit against partners. Dismissal.* A joint suit against two, as partners, may be dismissed as to one, and prosecuted as to the other. *Link v. Allen*, 318.
9. *Repetition of charge.* For a Court to repeat several times, on the return of a jury into court, to report that they cannot agree, disjointed parts of his charge, is error. *Swaggerty v. Caton*, 199.
10. *Jury sending back.* A jury having assessed several damages against different defendants, cannot be sent back with the instruction that the payment of the lesser damages will satisfy the larger. If they are, and then find a verdict against all for the larger sum, it will be set aside. *Dougherty v. Shown*, 302.
11. *Province of Judge. Not to examine witnesses.* Illegal testimony as to political opinions, brought out by a Circuit Judge, reprehended by this Court, and proper practice stated to be, to allow the parties and their counsel to present the case. *Sharp v. Treece*, 446.
12. *Exceptions to depositions.* *Hawkins v. McNamara*, 352; *Phipps v. Caldwell*, 349. EVIDENCE, 25, 26, 27.
13. *Dismissal of proceedings for condemnation when the judgment is void.* *Sullivan v. Fugate*, 20.
14. *Judgment by default, without service or appearance, void.* See ATTACHMENT, 14. *Gibson v. Carroll*, 23.
15. *Motion to dismiss certiorari, when to be made.* *McDowell v. Keller*, 449.
16. *Motion to dismiss writ of error, when to be made.* *Gillespie v. Goddard*, 777.
17. *Rule for security. Error in, waived.* If a rule be given for new security absolutely, the party cannot object that the rule does not give the option to justify his security, unless he appear and offer to justify. *Creamer v. Ford*, 307.

PRINCIPAL AND SURETY.

See DURESS. EXECUTION. *Owens v. Mynatt*, 675.

PROCESS.

1. *Leading.* How distinguished. See ATTACHMENT, 13. *Gibson v. Carroll*, 23.
2. *Same. Proof of service.* Where neither the issue or service of process

PROCESS—*Continued.*

appears, by production of the process, nor by anything upon the dockets of the court, and they are not assumed in the decree, a decree for sale will be held void. *Taylor v. Walker*, 734.

3. *Supreme Court. Final process.* The Supreme Court has jurisdiction to make any inquiry incident to its final process in causes determined in it. *Newman v. Justices of Scott County*, 787.

PROCESSIONING.

See EVIDENCE, 13. *Draper v. Stanley*, 432.

PROXIMATE CAUSE.

See EVIDENCE, 44. TRESPASS, 4.

PUBLICATION.

1. Levy of attachment must precede. *Ingle v. McCurry*, 26.
2. Record must show. *Ib.*
3. Must be ordered on oath. *Rucker v. Moore*, 726.
4. Evidence to disprove. *Ib.*

See ATTACHMENT, 3-6, 17, 19, 20.

PURCHASE MONEY.

Interest on. The interest on an account for purchase money, with payments, is to be computed on the basis of partial payments. *Curd v. Davis*, 574.

PURCHASER.

1. *Innocent.* Purchaser at execution sale can not avail himself of the plea of innocent purchaser. *Click v. Click*, 607.
2. Purchaser with notice. See MORTGAGE. *Meek v. Mathis*, 534.
3. Purchaser under judgment, which has since been reversed. *McBee v. McBee*, 558.

RAILROAD.

See TRESPASS, 4.

RATIFICATION.

See HUSBAND AND WIFE, 2. *Parker v. Cowan*, 518. ERROR *Evans v. Buckner*, 291.

RECORD.

1. Must show publication. *Ingle v. McCurry*, 26.
2. Statement in, that bill of exceptions was signed will not dispense with actual signature. *Garrett v. Rogers*, 321.

REDEMPTION.

1. *Decree. To bar.* To bar the right of redemption, under the Code,

REDEMPTION—*Continued.*

2124 and 4489, it is not sufficient that the sale be made on a credit. It must appear that, upon the application of complainant, the sale was so ordered. But a statement in the decree that, at "the special instance and request of the complainant, the said land shall be sold without the equity of redemption," is sufficient. *McBee v. McBee*, 558.

2. *Same.* To require the payment of a material proportion of the value of the land in cash, and decree the sale to be without right of redemption, is error. *Ib.*
3. *Same.* It may be that a sum may be required to be paid down, to cover the costs and counsel fees, without affecting the decree, in cases where both parties are represented by counsel, and the assent of the debtor's counsel might be presumed, or where it appears that the amount is not such as to affect the price. *Ib.*
4. *Construction of Statute.* The Act of 1865, ch. 10, s. 4, extending the time of redemption, and providing that the time, from the 6th of May, 1861, to the 1st of January, 1867, shall not be computed, has no application to sales made after its passage. *Henderson v. Felker*, 271.

REGISTRATION.

See SALE. *Charles v. Taylor*, 528. *Susong v. Williams*, 625.

RENT.

Landlord's lien for, may be enforced in Chancery. *Sharp v. Fields*, 571.

REPLEVIN.

1. *Bond.* Bond in replevin for costs only, is no compliance with the Code, 3377; and on a rule for security, the suit may be dismissed. *Creamer v. Ford*, 307.
2. *Same. Plaintiff and sureties.* The plaintiff in replevin is liable to judgment without reference to the conditions of the bond. The liability of the surety alone is affected by the bond. *Ib.*
Code cited, §§ 3191, 3192, 3377, 3390, 3391. *Ib.*
3. Bond may be looked to on question of jurisdiction. *Cline v. Gaut*, 399.

RESCISSION.

Of contract. For failure to perform. In 1849, Witt, by writing, signed by both parties, agreed with his grand-father, Hale, to live with him and his wife during their natural lives; to take good care of them; furnish them all the necessaries of life; to be good and obedient to them, as a son to his father and mother. Hale agreed to give Witt, on his, Hale's death, a tract of land, described in the writing. In 1854, another writing was entered into, defining more fully, in some particulars, the duties, rights and obligations of each. In 1856, this

RESCISSION—*Continued.*

bill was filed by Hale to rescind the contract, on the ground of failure on the part of Witt to perform his undertakings, and charging many acts of gross misconduct on the part of Witt. Held that the bill did not make a case for rescinding the contracts, but that an account should be decreed in favor of complainant for all outlay incurred by him, on account of failures on the part of Witt to provide for him and his wife, and to perform his contract. *Hale v. Witt*, 567. See also *Keeler v. Baker*, 639; *Martin v. Martin*, 644.

RES GESTÆ.

See EVIDENCE, 16, 17, 19, 20.

REVIVOR.

Sci. fa. after. A revivor on motion, at the term when the death of the ancestor is proved, against his widow and heirs at law, without *scire facias*, is void, and a *scire facias*, issued afterward to warn them, is a nullity. *Rucker v. Moore*, 726.

In Supreme Court. See SUPREME COURT. *Foster v. Burem*, 783; *Churchwell v. Bank of East Tennessee*, 780; RULES, 786.

REVOCATION.

A power of attorney made by a citizen of one State, to a citizen of another is revoked by a state of war between the two States. *Conley v. Burson*, 145. See ATTORNEY.

ROAD.

Order can not be contested by evidence *aliunde*. *Stanley v. Sharp*, 417.

RULES.

For revivor of causes in Supreme Court, 786.

SALE.

1. *Registered. Resale not registered. Creditors.* A sale of land being made by deed registered, it was rescinded by title bond to reconvey, unregistered. A creditor of the first vendee levied upon the land as his property. Held, that a bill would not lie by the original vendor to enjoin the sale. *Charles v. Taylor*, 528.
2. *Same. Rights of vendor. Practice. Remand to amend.* The bill being filed against the creditor alone, it was held that he was not affected by equities between the vendor and parties liable with the vendee on the judgment, and could not be enjoined from proceeding against the land until he had exhausted his remedy against the other parties to his judgment; but the creditor's present right of sale being declared, the cause was remanded to make new parties and adjust equities. *Ib.*
3. Sale for Confederate notes. *Williams v. Elkins*, 88.
4. *Execution sale. Purchaser must produce record.* A party claiming as purchaser at execution sale, must show his right; merely to let it

SALE—*Continued.*

appear in an answer, without producing the judgment and proceedings will not do. *Ib.*

5. *Opening biddings.* *Newland v Gaines*, 720.

See ATTACHMENT, EXECUTION, CHANCERY SALE, REDEMPTION, CONDITIONAL SALE.

SATISFACTION OF JUDGMENT.

1. *Scire facias to vacate.* To maintain, under section 2990 of the Code, a *scire facias* to set aside satisfaction of a judgment by sale of property, it is necessary to allege and show a previous adjudication of the plaintiff's want of title, under his purchase. The failure of title can not be enquired of in the proceedings by *sci. fa.* *Swaggerty v. Smith*, 403.

Cases cited. *Eddie v. Cowan*, 1 Sneed, 290. Code construed, 2990.

2. May be set aside in equity without previous adjudication. *Lanc v. Marshall*, 30.

SEIZURE.

See ABANDONED PROPERTY, BELLIGERENT RIGHTS, 2; CAPTURE.

SET-OFF.

1. *When plaintiff fails.* Where there is a finding by the jury that there is no cause of action on behalf of the plaintiff, there can be no set-off allowed to defendant. *E. T. & Va. R. R. Co. v. Galbraith*, 482.
2. *Same. Judgment.* Jury having negatived plaintiff's claim, and found for defendant in set-off, the proper judgment is, that defendant go hence and recover his cost. *Ib.*
3. *Same. Same On error.* But the verdict not being satisfactory, and the account being complicated, the Court set aside the verdict and remanded the cause for a new trial, or a reference under 2924 of the Code. *Ib.*

SETTLEMENT.

Presumed to include all dealings. A guardian, stating that he had executed a note as guardian, and had afterward settled with the County Court, it will be presumed, in the absence of proof, that he was allowed for the note on his settlement. *Carter v. Wolfe*, 694.

See *Parker v. Cowan*, 521.

SHERIFF.

Deed. When presumed. *Anderson v. Talbot*, 407. See SALE.

STAMPS.

1. *Instruments made within Confederate lines.* An instrument made within the Confederate lines is not void for want of a stamp. *Susong v. Williams*, 625.

STAMPS—*Continued.*

2. *Deed valid without. Evidence without.* United States revenue stamps are not essential to the validity of a deed, nor to its admissibility as evidence in a State court. *Sporrer v. Eifler*, 633.
3. *Conveyance. Agreement.* A conveyance without pecuniary or valuable consideration, does not require a conveyance stamp, but an agreement stamp merely. *Susong v. Williams*, 625.

STARE DECISIS.

1. *When not controlling.* The rule of *stare decisis* applies especially to rules of property, and decisions on the faith of which parties have acquired rights or made dealings. The Court is less reluctant to disturb a line of decisions, recently established, affecting, exclusively, rights fixed before the rulings were made, which do not affect sales of property, or rights acquired on the faith of such decisions. That the reversal gives to parties, whose rights have not been adjudicated, a different measure of justice from that previously administered to others in like cases, is not a serious objection to the reversal of such decisions. *Sherfy v. Argenbright*, 128.

STATE, ATTORNEY FOR.

See ATTORNEY, DISTRICT.

STATE CASES.

1. *Fraudulent conveyance.* Where Courts were created for a "Judicial Criminal District," but "having exclusive jurisdiction of all cases to which the State is a party, or which, by the laws now in force, require the services of an Attorney-General," held that this did not confer jurisdiction of a bill in the name of the State, to set aside a fraudulent conveyance made to defeat judgments obtained by the State. *State v. Alder*, 543.
2. In view of the subject matter, "cases to which the State is a party," means criminal cases. *Ib.*
3. Contested election is not. *Boring v. Griffith*, 456.

STATES.

1. *Sovereign. Congress. Powers of.* The States alone have power to regulate contracts amongst their own citizens, and to prescribe the rules of evidence in their own courts. *Sporrer v. Eifler*, 633.
2. During the war were *de facto* Governments, in the highest sense *Sherfy v. Argenbright*, 128.

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STATUTE.

1. *Takes effect, when.* *Adjournment without day.* An adjournment of the General Assembly to a certain day, to hold a special session, does not put acts passed, in operation until forty days from the end of the latter session. *Day v. McGinnis*, 310.
2. *Construction.* A subsequent statute may be looked to in construing a former one. *Hart v. Reynolds*, 208.
3. The present tense may apply to statute passed subsequently. *Vincent v. Vincent*, 333.

STAYOR AND SURETY.

Order of liability. On an authority, given by a stayor to a security, to enter his name as stayor on a note of about \$200, on which he was security, and two others, principals, the authority being presented by the surety to the J. P., the stay was entered and the surety said, “Now I am released.” Afterwards the stayor admitted in writing that he stayed the debt for the two principals. Held, that the surety was liable before the stayor, he having assented to the stay. *Stinnet v. Crookshank*, 496.

SUBROGATION.

Purchaser under void decree, who has paid off vendor's lien, subrogated to the vendor's right. *Lane v. Marshall*, 30.

SUPERSEDEAS.

See SUPREME COURT *Mabry v. Ross*, 769.

SUPPORT AND MAINTENANCE.

See CONTRACT, 5.

SUPREME COURT.

1. *Supersedeas.* *To interlocutory order.* The jurisdiction conferred on the Supreme Court, to supersede an interlocutory order, decree or execution, issued thereon, as in case of final decree, only applies to such

SUPREME COURT—*Continued.*

orders as are to be executed by some affirmative action or process of the Court. *Mahry v. Ross*, 769.

2. *Same. Order dissolving injunction.* An interlocutory order of a Court of Chancery, dissolving an injunction granted to prevent a defendant from taking a corporate office, is not such an order as it is within the power of the Supreme Court to supersede. *Ib.*
3. *Filing Record. Duty of Circuit Court Clerk.* It is not the duty of the Clerk of the Circuit Court to file a transcript for writ of error in this Court. *Gillespie v. Goddard*, 777.
4. *Practice in. Motion to dismiss. When to be made.* The motion to dismiss a writ of error must be made at the first term of the Court after the defendant in error has notice of the writ of error. *Ib.*
5. *Certiorari. When not awarded.* No *certiorari* will be awarded where it appears that it will not avail anything, as where it is for a portion of the record, which the Clerk certifies that he has made diligent search for and it can not be found. *Nave v. Nave*, 324.
6. *Revivor.* September 19th, 1865, death of plaintiff in error, in a law cause pending by appeal in error, suggested in this Court, and admitted. October 1st, 1867, counsel for plaintiff in error moved to abate the suit, and of the defendant in error, to abate the appeal. October 16, 1867, counsel for plaintiff in error moved to revive. Revivor allowed. *Churchwell v. Bank of East Tennessee*, 780.
7. *Same.* Revivor is allowed when the application is made at any time during the second term after the suggestion of the death, and, it seems, at any time after the second term, if made before the abatement is entered. *Ib.*
8. *By bill or scire facias.* A cause may be revived against non-residents by bill of revivor and publication, or by *scire facias* and publication. *Foster v. Burem*, 783.
9. *Same. Power to adopt Rules.* The Supreme Court has power to establish such rules, to define and regulate the revivor of causes, as may adapt its proceedings to the present state of the law regulating the inferior Courts. *Ib.*
10. Remand to amend. See JUDGMENT, 6. *Stewart v. McCuiston*, 427. SALE, 2. *Charles v. Taylor*, 528.
11. *Final process.* The Supreme Court has jurisdiction to make any inquiry incident to its final process in causes determined in it. *Newman v. the Justices of Scott Co.*, 787.
12. *Same. Mandamus to County.* A *mandamus*, in the nature of an execution, to compel the Justices of a county to levy a tax to satisfy a judgment recovered in this Court against the county, being moved for, and affidavits being filed that nothing was due, the Clerk was ordered to report whether anything, and how much, remained due. *Ib.*
13. Rules of Supreme Court for revivor of causes, 786.

SURETYSHIP.

1. *Proved at law.* In a case between a surety and the holder of a note, the fact of suretyship may be proved at law by parol. *Fowler v. Alexander*, 425.
2. *Defense at law.* A party appearing on the face of the note as joint maker, may plead in his discharge, suretyship, notice to the holder to sue, and failure for thirty days. Code, 1968. *Ib.*
3. *Exoneration. Before judgment.* A surety may bring his creditor and his principal before a court of equity, to compel the payment of debts, and to be exonerated, and attack fraudulent deeds before judgment. *Green v. Starnes*, 582.
4. *Chancery pleading. Objection to jurisdiction.* Objection that the surety has no right to file a bill until judgment against him, if good, would be waived unless insisted on by plea, demurrer, or motion to dismiss. Code, 4309. *Ib.*

See STAYOR.

SURPRISE. See NEW TRIAL. *Sharp v. Treece*, 446.

TRESPASS.

1. *Person may divert impending evil.* If the plaintiff in error, discovering that soldiers would encamp upon his own land, or that of the defendant in error, and *would* take the timber and property of one or the other, informed them that he was a rebel, and that defendant in error was a Union man, and requested them to take the property of the latter and spare his, he incurred no civil responsibility. *Smith v. Brazelton*, 44.
2. *Advice to party who is justified.* If timber was cut, and other property taken, by the advice of a citizen, he cannot be held as a trespasser, unless it appears that the act done was unlawful, and subjected the party advised to civil liability; and this defense may be relied upon under the plea of not guilty. *Ib.*
3. *Act of omission.* A charge, that the mere omission of a defendant to interfere for the discharge of a prisoner before a Confederate military officer, is a circumstance which may be looked to with the other facts of the case, to determine the guilt of the defendant of the trespass, is error. *Swaggerty v. Caton*, 199.
4. *Injury causing death. Proximate cause.* An action cannot be maintained, under the Code, 2291, 2292, giving a right of action to the personal representative of a decedent, for injuries resulting in his death, unless the death is the natural and proximate consequence of the acts proved. *Wagner v. Woolsey*, 235.
5. *Same. Facts.* Proof that the plaintiff intestate was driven from his home by the defendants; afterward enlisted in the Federal army; was captured, and detained as a prisoner of war, and died in prison. Held, that the death was not a consequence of defendant's acts, such as to subject defendant to this action. *Ib.*

TROVER. See CONVERSION.

TRUSTS.

1. *Parol. Husband and wife. Contracts between.* A husband; being one of two executors, with a power to sell land and divide proceeds amongst devisees, of whom his wife was one, after a sale made on a credit, at which the son of him and his wife bought a tract of land for the wife, bidding a part of her share of the proceeds, giving no note, but taking a deed to himself; agreed by parol with his wife, before the purchase money fell due, that she should have the land for her sole and separate use. Held, that the marital right had not attached to the proceeds, and that the trust in favor of the wife, was valid. *Click v. Click*, 607.
2. *Same.* The husband having subsequently taken a deed from the son to himself; held that he took it subject to the trust for the separate use of the wife. *Ib.*
3. *Same. Preferred to debts of husband.* A creditor having attached the land as the property of the husband, the deed to him being registered; held, that the right of the wife was superior to the claims of creditors. *Ib.*
4. *Implied. Parol proof.* Where one person buys land for himself and another, and pays a portion of the price out of the moneys of such other person, taking a deed to himself, a trust will be set up in favor of the person whose fund is so used. *Gass v. Gass*, 613.
5. *Preferred to creditors of trustee.* The beneficiary in such a trust has a right superior to the claims of creditors of the trustee, though no trust is declared in the deed. *Ib.*
6. *Evidence to defeat.* A note taken by the supposed beneficiary for the money paid, and a delivery to the trustee of his bond for title, executed after the purchase, would ordinarily be conclusive against a subsisting trust. *Ib.*
7. *Fiduciary. Imbecile. Dealings between.* But the beneficiary being the mother of the trustee, old, speechless from paralysis, and of weak intellect, he being intrusted with all her means, and using them to procure the delivery of the note as paid, and there being no proof that he explained the transactions to her, the trust was held to remain in force. *Ib.*
8. *Same. Same.* Credits on a note, placed there or procured by the maker, under such circumstances, must be fortified by extraneous proof of fairness. *Ib.*

See VOLUNTARY CONVEYANCE. *Susong v. Williams*, 625.

UNITED STATES.

1. *Decisions of Supreme Court of.* When controlling. *Sherfy v. Argenbright*, 128.
2. *Brands.* See CAPTURE, 5.
3. *Title of.* *Ib.*
4. *Stamps.* See STAMPS.

USURY.

Conventional interest law. Void note. Original consideration. Renewal.

If a note was void under the Act of 1860, to allow conventional interest, because it reserved ten per cent. upon its face, not being for loaned money, but a pre-existing debt, yet the original consideration if valid, would not be affected by the subsequent illegal note, and an action might be maintained upon such consideration; and a note given in renewal without the illegal reservation of usury, will be valid, though the usury be added in. *Scruggs v. Scruggs*, 150.

VENDOR'S LIEN.

1. *On land not conveyed. For debt assumed.* A title bond, reciting that the maker had sold his land to the vendee for a stated sum, composed of items, one of which was "the assumption of a debt to W. D. T., now bid upon the land, to be paid, 25th of December, 1863," and concluding with an obligation to make a title on the receipt of the last payment, held to create a lien for the payment of the note to W. D. T., he being a purchaser of the land at execution sale, who voluntarily permitted redemption at the amount stated as the sum assumed, for which he accepted the purchaser's note. *Trent v. Kyle*, 663.
2. *Priorities between liens.* Where two join in a sale of real estate, securing a lien for purchase money, the relative rights to which they fail to ascertain, the law will give to him whose right is superior, the priority of satisfaction. As where a party holding land under execution sale, with redemption expired, joined the execution debtor in a sale to a third person, the purchaser at execution sale was held to have priority. *Ib.*
3. *Want of title in vendor.* On a bill to enforce a vendor's lien, defects in the title can not be set up by answer, to defeat a sale. To be available, they must be presented by cross bill. Case approved, *Hurley v. Coleman*, 3 Head, 265. *Curd v. Davis*, 574.

VENUE.

1. *Change of. Nearest County.* A change of venue must be to the nearest county, free from the like exception. A cause can only be taken out of the circuit when the county out of the circuit is nearer than any within it, not subject to exception. *Coover v. Davenport*, 368.
2. *Same. What is.* The nearest county is the one whose county seat is nearest. *Ib.*
3. *Judicial knowledge. Locality, etc.* The Court will take judicial notice of the local divisions of the State, and their relative positions, and the comparative distances of their county seats. *Ib.*

VERDICT.

1. *Aider by.* PLEADING, 11, 12. *Smuth v. Brazelton*, 44. *Wolfe v. Tyler*, 313.
2. *Proof to support.* See EVIDENCE, 36-43.

VOLUNTARY CONVEYANCE.

Reconveyance. Rights of creditors of Grantee. Where a mother conveys property to a son by registered deeds, reciting as a consideration, a moral obligation to convey, but in fact upon secret agreement of grantee to reconvey to the grantor, when peace should be re-established, the motive of the grantor being fear of confiscation; the reconveyance being made, a party who had dealt with the son on the faith of his apparent property before reconveyance, was held entitled to subject the property to his debt. Such a conveyance is valid between the parties, and the reconveyance being without a consideration, is void as to creditors of the son. *Susong v. Williams*, 625.

WARRANTOR.

1. Not competent before act of 1869, to prove validity of his own deed *Greene v. Starnes*, 582.
2. *Recitals in Warranty.* In a conveyance, the recital that the grantor holds the estate in a specific mode, is not an indication of an intent to convey what interest is so held, and exclude an interest otherwise held, such as will control express words of conveyance and general warranty. Warranty is an estoppel. *Susong v. Williams*, 625.

WIDOW.

1. *Year's support. Step-children.* Step-children living with a widow at the time the year's support is assigned, afterward taken away without the widow's consent, are not entitled to any part of the year's allowance. *Vincent v. Vincent*, 333.
2. *Same. Fixed by state of things at death of husband.* Year's support should be fixed as to amount, by the condition of things at the death of the husband, not by changes which take place within the year. *Ib.*
3. *Property exempt. Widow takes.* Articles exempt from execution by laws passed since the Code, go to the widow under the provisions of sec. 2288. *Ib.*
4. *Statute. Construction.* Statute in present tense may be applied to Acts subsequently passed. *Ib.* See DOWER.

WILL.

1. *Construction. Power of disposition.* A devise to a wife, to enable her to raise and educate children, of all the testator's property, real and personal, "to have, manage and use, during her natural life, and at his death to be divided among his children;" held not to give the wife an absolute estate. *McClung v. McMillan*, 655.
2. *Same. Devise to a class.* A codicil being made to the above, providing that if the wife should die before the younger children are raised and educated, they should have an additional sum sufficient to raise and educate them; held, that the children, under this will, did not take as a class with right of survivorship, but that a child left by a son who died before his mother would take the son's share. *Ib.*

WILL—Continued.

3. *Construction. Rest of land not deeded.* A testator died possessed of five tracts of land, one of which he devised to his wife during life or widowhood, disposing of the fee in the land after her death or marriage. He had given away, by deed, one tract of land, before he made his will, to two daughters and a grand-daughter. He devised the proceeds of the *rest of his land not deeded away*. He then gave to a grand-son one of his tracts, by sufficient description. The grand-son died in his life time without issue. He also, after some small bequests of personalty, gave the *rest of his personal property, in the house and out of doors*, to his wife, for life or widowhood, and provided that if any property should be left at the death of his wife, it should be equally divided between four sons. He stated in the will, that he had portioned certain daughters, and had given to certain sons, all he intended for them. Held, that the gift to the daughters and grand-daughter, as the *rest of his land not deeded away*, was not intended as residuary, but as designating the specific lands devised; that the lapsed land did not go to them as residuary devisees; that the gift of property to the four sons, if any was left at the death of the widow, was confined to personalty, and that the lapsed land was undisposed of by the will. *Vitteto v. Atkins*. 553.
4. *Devise. Against policy void.* A will which took effect in 1859, devising land to a negro, (who was, by the will, to be free at the death of the testator's wife,) to reside upon, was held to be against the policy of the law as it then stood, and void. *Cochreham v. Kirkpatrick*, 327.
5. *Tested by the law, at the death of the testator.* The will takes effect from the testator's death, and the law then in force determines its validity, even though the enjoyment of the devise may be postponed until a different state of the law prevails. *Ib.*
6. *Construction. Sum given for a purpose which fails.* A will contained a bequest of freedom to a slave, on the death of a testator's wife, the freed woman to be sent to "Liberia or some other suitable place, and to meet the expense," \$500, to be set apart, to be "placed in faithful hands, to inure" to her benefit. Held, that on the emancipation by law, the legatee became entitled absolutely to the \$500. *Lynch v. Burts*, 600.

YEAR'S SUPPORT.

See WIDOW. ADMINISTRATION.

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